DOCUMENT RESUME

ED 419 770 SO 029 101

TITLE	Update on Law-Related Education, 1997.
INSTITUTION	American Bar Association, Chicago, IL. Special Committee on Youth Education for Citizenship.
ISSN	ISSN-0147-8648
PUB DATE	1997-00-00
NOTE	189p.; For the 1996 issues, see ED 406 298.
AVAILABLE FROM	American Bar Association, Special Committee on Youth Education for Citizenship, 541 North Fairbanks Court, Chicago, IL 60611-3314 ($30 per year).
PUB TYPE	Collected Works - Serials (022)
JOURNAL CIT	Update on Law-Related; v21 n1-3 1997
EDRS PRICE	MF01/PC08 Plus Postage.
DESCRIPTORS	Citizen Participation; *Citizenship Education; Civil Law; Civil Liberties; Conflict Resolution; *Constitutional Law; Criminal Law; Democratic Values; Due Process; Elementary Secondary Education; Federal State Relationship; Instructional Materials; International Law; Justice; *Law Related Education; Social Studies
IDENTIFIERS	American Bar Association; *United States Constitution

ABSTRACT

This document consists of 3 volumes of a serial devoted to law-related education (LRE) offering background information on a wide range of legal issues and teaching strategies for LRE. The title themes for the three volumes include "International Law," "Crime and Freedom," and "Civil Law". Background articles are provided along with teaching materials on a variety of topics, such as human rights, war and peace, land mines, global warming, juvenile law, rights of the accused, protecting offenders' rights, free trials and free press, tort law, the civil jury, and Congress. Additionally, issues of "Update on the Courts" provide current information on Supreme Court and other federal court cases and decisions. Teaching materials propose methods that involve class discussion, collaborative learning, and role playing activities. Many lesson plans include student handouts and visuals. (RJC)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

$6.00

WINTER 1997 / VOL 21 NO 1

UPDATE ON LAW-RELATED EDUCATION

American Bar Association Special Committee on Youth Education for Citizenship

ED 419 770

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

☒ This document has been reproduced as received from the person or organization originating it.

☐ Minor changes have been made to improve reproduction quality.

• Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

PERMISSION TO REPRODUCE AND DISSEMINATE THIS MATERIAL HAS BEEN GRANTED BY

M.C. McKinney-Browning

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

1

SO 029 101

Special Issue!

International Law

Featuring Articles, Teaching Strategies, and Student Materials for the LRE Professional

Special International Edition

When Kansas and Colorado have a quarrel over the water in the Arkansas River, they don't call out the National Guard in each state and go to war over it. They bring a suit in the Supreme Court of the United States and abide by the decision. There isn't a reason in the world why we cannot do that internationally.

Harry S. Truman

Since the beginning of history, nations have resorted to war to settle their disputes. Despite all the devastation that war has wreaked, despite all the humanitarian efforts that followed, despite ethics and religion and common sense, they unfortunately still do.

Today, violence erupts all over the world: among the Serbs, Croats, and Muslims in Eastern Europe; among the Catholics and Protestants in Northern Ireland; and among the Hutus and Tutsis in Africa, to name just three of many. There are abundant rationalizations for the conflicts, but little progress in dealing with them peacefully.

There are some international courts, or at least systems of arbitration, available to help nations resolve conflict before it erupts into war. The World Court handles war crimes, the World Trade Organization reconciles import and export restrictions, and localized trading agreements such as the North American Free Trade Agreement (NAFTA) and the European Community (EC) facilitate international trade.

Yet, international courts are only part of the answer to ensuring a peaceful earth. Another critical tool is education—understanding the causes of world conflict and being aware that there are nonviolent means for resolving them. With specially prepared articles and teaching strategies, this special International Law Edition of *Update on Law-Related Education* is dedicated to contributing to the school community's understanding of global conflict, as well as the effectiveness, current limitations, and potential of international law in dealing with it.

In this issue, you'll find materials about international law and terrorism, land mines, and cross-border pollution, as well as human rights and trade. Immigration, the proliferation of weapons of mass destruction, and control of infectious diseases are also discussed. And, finally, there is outer space: it is well settled that nations control their own air space, but how high up? What of the stratosphere? And what about space debris?

On behalf of the ABA Special Committee on Youth Education for Citizenship, our contributors, and the *Update* staff, I invite you to share this important edition with your students. It will prove a great aid in making international law—a complex and demanding topic—much more accessible to young people, who need to begin understanding it.

The world might depend on it.

Ronald A. Banaszak

Ronald A. Banaszak
Director, Youth Education Programs
ABA Division for Public Education

Cover Illustration by David Lee Csicsko Design by DePinto Graphic Design
Produced by Creative Services Associates, Inc.
©1997 American Bar Association
ISSN 0147-8648 PC #738-0100-2101
Funding for this issue has been provided by the American Bar Association Fund for Justice and Education; we are grateful for its support.
Update on Law-Related Education is published three times each year (winter, spring, fall) by the American Bar Association Special Committee on Youth Education for Citizenship. Chair: Allen W. Kimbrough; Director, Division for Public Education: Mabel C. McKinney-Browning; Director, Youth Education Programs: Ronald A. Banaszak; Director, Publishing and Marketing: Seva Johnson; Editor: Kenneth F. Fenske.
Update helps classroom teachers and law-related education program developers educate students about the law and legal issues. The views expressed in this document are those of the authors and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association, the Fund for Justice and Education, or the Special Committee on Youth Education for Citizenship.

A one-year subscription to the UPDATE PLUS package costs $30.00 and includes three issues each of *Update on Law-Related Education*, *Update on the Courts*, *LRE Report* with the Plus Poster Page, and the special Student *Update* Edition for Law Day each spring.
For subscription and back issue information, contact American Bar Association/YEFC (15.3), 541 N. Fairbanks Court, 15th Floor, Chicago, IL 60611-3314; (312) 988-5735; http://www.abanet.org/publiced FAX (312) 988-5032, ATTN.: Nessel. Internet: abapubed@abanet.org
FOR CUSTOMER SERVICE, CALL (312) 988-5522
All rights reserved. Printed in the United States of America.
The American Bar Association is a not-for-profit corporation.
Printed on recycled paper.
EdPress

—SCHEDULED FOR PUBLICATION THIS SPRING—
DON'T MISS OUR SPECIAL LAW DAY EDITION ON
Crime and Freedom

Contents

Volume 21, Number 1
Winter 1997

International Law

2 Foreword *Lucinda A. Low*

4 Immigration: One of Today's Enigmas
***Ellen G. Yost** examines the question: do we really want to exclude immigrants?*

6 Understanding the World Around Us
***Santo Scarpinito** presents a student activity using F.I.N.D. an article and Seeing R.E.D. to analyze articles and investigate issues.*

7 Controlling Infectious Diseases
***Wm. Lane Porter and David P. Fidler** explain how bacteria, viruses, and parasites are the world's leading causes of death.*

9 **Teaching Strategy** Human Rights—The Answer to Peace?
***Mary Louise Williams** enables students to better understand how and why the concept of human rights has become fundamental for achieving world peace.*

12 **Teaching Strategy** War, Peace, and Human Rights: Listening to Children's Voices
***Gayle Mertz** provides information and activities on weapons of mass destruction, children's rights, and international law.*

15 Tradeoffs Associated With Fighting Terrorism
***Stuart H. Deming** discusses how some freedoms must be compromised for safety's sake.*

17 A Seedling in Sarajevo
***Homer E. Moyer, Jr.**, presents information on efforts of the American Bar Association to boost a new world court.*

18 **Teaching Strategy** Freedom of the Press in an International Perspective
***Barbara Miller** helps students compare the role of the press and citizen access to information in the United States and other countries.*

24 War Crimes Tribunals: A Permanent Criminal Court?
***James E. Dorsey and Kristi Rudelius-Palmer** examines how war-related crimes have proliferated to such an extent that a new court may be in order.*

26 Combating the Proliferation of Weapons of Mass Destruction
***Bonnie Jenkins** reviews how nuclear, biological, and chemical weapons, and the means to deliver those weapons, threaten our planet.*

28 **Teaching Strategy** Hypothetically a Case of Conflicting National Interest
***Santo Scarpinito** helps students explore ways to discuss political and legal arguments rationally and understand the International Court of Justice.*

30 Humanitarian Consequences of Land Mines
***Ken Rutherford** explains how land mines devastate the civilian populations of war-torn countries.*

32 **Teaching Strategy** Land Mines—After the War!
***Gayle Mertz** helps students explore the brutal reality of human suffering, the complicated relationships between nations, and the controversies about the United Nations.*

36 The Environment: The Tie That Binds
***Elissa C. Lichtenstein** suggests that there are many reasons to be concerned about pollution, and and one of them is you.*

40 **Teaching Strategy** Global Warming on the International Agenda
***Patricia Keenan-Bryne and Mark Malkasian** provide strategies to help students analyze the different perspectives of nations concerning global warming.*

45 Law in Outer Space
***Lieutenant Colonel William G. Schmidt** presents background information on decisions about who controls what is in outer space.*

Update on Law-Related Education
Editorial Advisory Board

Lee Arbetman
National Institute for Citizen Education in the Law
Washington, D.C.

Marshall Croddy
Constitutional Rights Foundation
Los Angeles, California

Frank Kopecky
University of Illinois
Center for Legal Studies
Springfield, Illinois

Gayle Mertz
Law-Related Education Network
Boulder, Colorado

Michael H. Reggio
Oklahoma Bar Association
Oklahoma City, Oklahoma

David Schimmel
Department of Educational Policy, Research, and Administration
University of Massachusetts
Amherst, Massachusetts

Beverly Barr Vaughan
Law and Government Magnet
Marshall High School
Rochester, New York

Foreword

This special edition of *Update on Law-Related Education* introduces the reader to some important issues in the international arena and the responses of our legal systems—both domestic and international—to them. How do we curb the proliferation of weapons of mass destruction? How can we protect our population from terrorist threats? In a shrinking world, how can we reduce the risks of infectious, sometimes deadly, diseases spreading across borders? Who should regulate the rights to access outer space? What can be done to reduce ozone depletion? Prevent global warming? Preserve biodiversity? Should countries have an absolute right to control immigration across their borders? Does it matter if the potential immigrants are refugees from war, are fleeing religious persecution, or are simply seeking better job opportunities? Are there certain human rights that every country must recognize? Are women and men entitled to the same human rights? Should goods produced in countries whose governments do not respect human rights be allowed to enter the United States on the same terms as goods produced in countries that give full respect to human rights?

These questions, and others, challenge our legal systems on an ever-increasing basis. They also challenge governments to join together—sometimes on a bilateral basis, sometimes multilaterally—to devise practical, enforceable systems to prevent, regulate, and punish conduct. This can be done through treaties and other international agreements, through harmonization of domestic laws, and through the creation of appropriate dispute-resolution mechanisms. These questions challenge international institutions to bring countries together in a search for the common ground and mutually beneficial accommodations. They challenge governments to avoid expedient, political solutions; unilateral "fixes"; and half-measures. In short, they challenge all national and international institutions and systems of law. They also challenge non-government organizations to serve as constructive sources of information, ideas, assistance, and agents for change. Finally, they challenge citizens to become educated about the larger world and its institutions and processes.

The authors of the articles in this edition are experts on their particular topics. To put these individual topics in a larger perspective, the focus is placed here on the "big picture"—the role of law and legal systems in dealing with international issues and the importance of a rule of law.

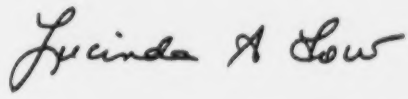
In the United States, we do a poor job of educating both our population and our leaders about the international legal system. While it is

not perfect, international law offers a far better alternative than the chaos and unilateralism that would dominate in its absence. We should support the rule of law internationally, and we should strive to increase its effectiveness. Since international law is founded on the principle of voluntary agreement, participation in international institutions and accession to international agreements do not represent a usurpation of a country's sovereignty. It is international law that calls for the trial of war criminals in the former Yugoslavia. It is international law that reduces the risk of infectious disease and cross-border pollution. It is international law that promotes peace and restrains war. It is international law that has contributed to the material wealth of the United States in the last 50 years, by promoting the free flow of goods and services.

Domestic laws, policies, and institutions play an important and intertwined role in international issues and problems. Most international problems—both those arising out of private transactions and disputes and those arising in the public arena—implicate a combination of international and domestic law. The mix will vary depending on the specific problem and the circumstances.

The issues that are addressed here are principally issues in the public arena. They are but a few of the international issues our laws and institutions must grapple with now and for the foreseeable future. Whatever domestic- and international-law measures governments take to deal with these issues will affect the rights and obligations of the citizens and enterprises within their borders.

Whether your students see themselves simply as citizens or as future policy-makers, lawyers, or other participants on the international scene, I commend the articles in this issue to you. I encourage you to help them learn as much about the international system as they do about our own domestic legal system and to support the international rule of law, both at home and abroad.



Lucinda A. Low

Chair of the ABA Section of International Practice and a member of the Washington, D.C., firm of Miller & Chevalier, Chartered.

Immigration: One of Today's Enigmas

Do we really want to exclude immigrants?

Ellen G. Yost

Update on Law-Related Education, 21.1, 1997, pp. 4–5. © 1997 American Bar Association.

The United States has always been a land of immigrants. Our history and folklore are filled with memories of Ellis Island and the Statue of Liberty offering a haven for the tired, hungry, and poor of the world. Many of our parents and grandparents came from other countries during several great waves of immigration. Fulfilling the American Dream, many rose to affluence in one generation.

But the news today is full of stories that do not fit this image: Haitian refugees intercepted at sea and sent back to Haiti; Chinese illegal immigrants returned to China when rescued from their shipwrecked boat; candidates for high political office disqualified for having hired, or given the appearance of having hired, illegal aliens to work in their homes; Mexican citizens risking their lives on a daily basis while crossing the U.S.-Mexican border to seek work; Korean shopkeepers harassed in Los Angeles. Such anti-immigration sentiment appears to be growing. Many Americans fear that U.S. jobs are being lost to foreign workers, that illegal aliens benefit from public assistance and drain the economy, and that the refugee program allows terrorists to enter the United States.

Congress, reflecting that sentiment, has been debating immigration issues. On October 3, 1996, President Clinton signed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, one of the most radical pieces of immigration legislation ever to pass both houses of Congress. It contains three particularly troubling provisions. First, it would prohibit U.S. sponsors from petitioning for admission of immigrants unless the sponsor's income is at least one and a half or two times the poverty level. This is not to keep immigrants off welfare, for they must prove they have enough income to not become public charges. It is an attempt to keep out immigrants of modest means. Second, the law will impose a ten-year ban on the admission of immigrants who are out of status for one year or more. Because a high proportion of undocumented immigrants have U.S. citizen or lawful immigrant relatives who have been approved for permanent residence and are waiting for a visa number to become available, the new law will have the consequence of tearing families apart. Third, it will punish genuine refugees seeking asylum from persecution if they miss a one-year deadline for applying for asylum. These are only some of the new law's cruel provisions that will punish U.S. citizens, legal permanent residents, their foreign relatives, and those seeking refuge.

Too Restrictive?

While the Congress and many private citizens are concerned that the United States admits too many immigrants, many are concerned that immigration may be too restrictive. Many foreign-born U.S. persons must wait for periods of up to 15 years for their brothers and sisters to receive permission to join them in the United States. A permanent resident who goes to his home country to marry discovers that it will take almost four years for his wife to obtain permission to join him in the United States.

Many Hong Kong businesspeople, in anticipation of the Chinese takeover of Hong Kong in 1997, have moved to Toronto and Vancouver, Canada, during the past decade because they could not obtain permission to live and work in the United States. This influx has substantially enriched the Canadian economy. Many U.S.-based multinational companies and companies from Canada, Europe, and the rest of the world with existing or proposed U.S. operations seek to hire foreigners to work in the United States. They find it increasingly difficult to obtain authorization for foreign workers due to

Ellen G. Yost practices immigration law, concentrating on business-related immigration, with the firm of Griffith & Yost in Buffalo, New York. She is co-chair of the Immigration and Nationality Committee of the American Bar Association Section of International Law & Practice and a member of the ABA's Immigration Coordinating Committee.

efforts of the U.S. Department of Labor to protect the jobs of U.S. workers. It takes careful planning by a foreign business seeking to establish operations here to be able to bring the necessary employees to the United States. Many talented, hardworking people are denied the right to pursue the American Dream.

What should we make of this enigma? Why, in the land of immigrants, do we blame so many problems on immigration? Is our system too lax or too restrictive? Economists debate the economic effect of immigration, but it is widely agreed that immigrants add more to the economy than they take away. Do we really want to be a society that denies public school education, and even basic necessities, to children living here? These are issues of intense emotional political debate.

The United States, like many nations, regulates immigration strictly. Decisions regarding which categories of persons will be admitted and which countries or areas of the world will be favored, i.e., immigration policy, are made by the United States Congress, which enacts the immigration laws. The debate about whom to admit and whom to bar at the border is political, and our immigration laws are in large part the result of congressional lobbying by special interest groups. It is necessary to understand the crosscurrents underlying the political debate.

Refugee Numbers Growing

The United Nations estimates that, as a result of famine, war, and other natural and man-made disasters, there are 19 million refugees in the world. Because of the sheer numbers, many of the industrialized countries, including the United States and members of the European Union are closing their borders to refugees.

On the other hand, as the "globalization" of the world proceeds, the United States signed the North American Free Trade Agreement (NAFTA) with Canada and Mexico to facilitate the free flow of commerce across North American borders. Multinational corporations with worldwide operations need to move their executives, managers, and employees with specialized knowledge from one country to another. U.S. companies desire to sell and to source their products abroad. In a global economy, companies need to transfer people, not just goods, across borders to facilitate trade.

The following is a description of the current U.S. immigration system and policy. The applicable law is the Immigration Act of 1952, which has been frequently amended. The laws are administered by the Immigration and Naturalization Service, a branch of the U.S. Department of Justice, and the U.S. Departments of State and Labor.

In 1990, Congress amended the immigration laws substantially. The decision was made to admit highly skilled persons and to bar unskilled immigrants, i.e., those with less than two years of training. Since 1990, the United States has closed its borders to unskilled and poor persons seeking economic opportunity. However, it has become more welcoming for companies or individuals seeking temporary entry for business purposes or permanent residence based upon an offer of a job that requires skills.

The immigration laws distinguish between nonimmigrants (those who enter the United States temporarily to visit, study, work, etc.) and immigrants (those who enter with the intention of staying permanently). Each person entering the United States, who is not a citizen, is classified as either an immigrant or a nonimmigrant. Citizens of most countries must obtain either immigrant visas (green cards) or nonimmigrant visas at a U.S. consulate or embassy abroad. Citizens of Canada and British Commonwealth countries generally do not have to obtain a visa at a consulate abroad, although they must qualify for admission by meeting all the requirements of U.S. immigration law concerning visa status.

Some Misconceptions

It is a common misconception that anyone may enter the United States as an immigrant with a green card if he or she waits long enough. That is not true. There are only four types of potentially acceptable applicants: those with family relationships, job offers, a need for political asylum, or investment interests. Therefore, a person seeking to immigrate must (1) have an immediate relative (spouse, parent, brother, sister, or child) who is a U.S. citizen or a permanent resident, (2) have a job offer from a U.S. employer, (3) be able to prove a reasonable fear of persecution upon returning to one's home country, or (4) have at least $500,000 invested in a business that creates 10 jobs. Currently, the United States admits 675,000 immigrants annually, and qualified applicants in excess of those numbers must wait in line for an immigrant visa to become available before they may be admitted.

Permanent residents may apply for citizenship five years after obtaining their green cards, with the exception of spouses of U.S. citizens who may apply for citizenship after three years, provided they remain in the United States or are not deemed to have abandoned their intention to remain in the United States permanently.

Persons who desire to enter the United States temporarily, not permanently, and those who do not qualify for immigrant visa status often may be admitted as nonimmigrants for varying periods of time depending on their intended activities in the United States and the country of their citizenship. Some visitors are admitted as B-1s and B-2s, students as F-1s, engineers and nurses as H-1s, and so on through the alphabet. Generally, the spouses and children of nonimmigrants may not work. There are no numerical limita-

continued on page 16

Understanding the World Around Us
F.I.N.D. an Article and Seeing R.E.D.

Santo Scarpinito

Update on Law-Related Education, 21.1, 1997, p. 6. © 1997 American Bar Association.

Americans sometimes find it difficult to understand the role of the United States in world affairs. Yet, keeping up with world events is key to understanding complex issues. You can use two instruments of motivation to help you gain an understanding of issues and analyze their importance. Both give you a means for analyzing information and are based on the typical current events platform that teachers use.

Through F.I.N.D. an Article, you identify an issue, as well as the facts and the participants involved. Then you isolate the dilemma that the issue presents. If you wish, you can take F.I.N.D. one step further and propose a possible solution to the dilemma. By using Seeing R.E.D., you identify an issue, evaluate it in terms of the United States and the world, and then take and defend a position on it.

Instruments of Motivation

Seeing R.E.D.

- Recognizing the Issue
- Evaluating the Issue
- Defending the Issue

F.I.N.D. an Article

- Facts
- Issue
- Nation(s) Involved
- Dilemma

The formats for organizing information provided here have been student tested and have proven enormously successful in helping other students analyze information.

1. Select a news source (a current magazine, paper, or broadcast) that describes a current issue.
2. Choose an instrument of motivation for analyzing the information. Use the format to record your findings on a separate sheet of paper.
3. On the assigned day, present your findings. If you analyzed information using the F.I.N.D. format, emphasize identification of the dilemma. If you used the Seeing R.E.D. format, emphasize defending the issue.
4. Be prepared to answer questions from other students and your teacher.

These approaches to information analysis have been as much the product of necessity as of innocence. F.I.N.D an Article was developed to help students analyze issues. Students would ask whether there was anything they could do for .... and my reply was always "find an article." Repeatedly they would ask, "But what do you want me to do with it?" To meet the need for student direction, the phrase "find an article" was replaced with "F.I.N.D. an article."

On September 4, 1995, U.S. military personnel engaged in illegal behavior while stationed in Okinawa, Japan. Many of my students were outraged by the news account of the behavior and expressed remorse at being American. Seeing R.E.D. was developed as a way to calm the anger of students through a thorough understanding of the issue.

Santo Scarpinito established and designed the international law course of study and curriculum for Project P.A.T.C.H., the K–12 law-related education program of the Northport-East Northport, N.Y., school community. Mr. Scarpinito is Project P.A.T.C.H.'s instructional technology coordinator. http://northport.k12.ny.us/

Controlling Infectious Diseases

Bacteria, viruses, and parasites are the world's leading causes of death.

Wm. Lane Porter and David P. Fidler

Update on Law-Related Education, 21.1, 1997, pp. 7–8. © 1997 American Bar Association.

According to the World Health Organization (WHO), infectious diseases are the world's leading cause of death, killing at least 17 million people (about 33 percent of 52 million persons who die annually). Of the 17 million, about 9 million are young children. WHO recently stated that the world faces a crisis in connection with infectious diseases.

Background

An infectious disease is caused by the presence of bacteria, viruses, or parasites. Infectious diseases range from those found in specific geographical areas (such as typhoid fever—80 percent in Asia) to diseases found worldwide, such as acquired immunodeficiency syndrome (AIDS). The federal government's National Science and Technology Council Committee on International Science, Engineering and Technology (CISET) emphasizes that the modern world is a very small place; any city in the world is only an airplane ride away from any other city. Infectious diseases in the form of tiny microorganisms can and do easily travel across borders within or on human or animal hosts. These diseases threaten our national health and security. Consequently, controlling disease outbreaks in other countries is important, not only for humanitarian reasons, but because such control may prevent those diseases from entering the United States.

CISET has determined that the national and international system of infectious disease surveillance, prevention, and response is inadequate to protect the health of U.S. citizens. Consequently, on June 12, 1996, Vice President Al Gore announced the Clinton administration's new policy to address the threat of infectious diseases through improved domestic and international surveillance, prevention, and response measures.

Success and Problems

International

There has been much success in fighting infectious diseases. For example, as a result of international health campaigns, smallpox has been eradicated from the earth. Smallpox was an infectious virus disease characterized by fever, vomiting, and pustular eruptions that often left pitted scars, or pockmarks, when healed.

Since 1988, when WHO launched a worldwide eradication campaign, cases of poliomyelitis (popularly, polio) have fallen by about 85 percent according to WHO. Polio includes infantile paralysis, an acute infectious disease (to which children are especially susceptible) caused by a virus inflammation of the gray matter of the spinal cord; accompanied by paralysis of various muscle groups that waste away, which usually results in permanent deformities. There are now 145 countries completely free of the disease, and an estimated 82 percent of all eligible children in the world have received the recommended three doses of oral polio vaccine. In the Americas (north and south), polio has been eradicated for over four years; WHO reports the last case in 1991 in Peru.

However, despite these successes, the emergence of new infectious diseases and the re-emergence of old diseases, coupled with resistance to antibiotic drugs, has created a serious crisis. WHO has classified these infectious diseases into three categories, each of which requires a different type of intervention.

- ***Old diseases—old problems:*** This category includes diseases that can be eradicated (e.g., polio); diseases that can be eliminated as public health problems (e.g., measles, neonatal tetanus); and diseases that can be controlled (e.g., cholera and other diarrheal diseases).
- ***Old diseases—new problems:*** This category includes diseases that have been around for decades, but that are re-emerging often with resistance to antimicrobial drugs (e.g., tuberculosis, malaria).

Wm. Lane Porter, J.D., M.P.H., practices international law in Washington, D.C., and is currently chair, International Health Law Committee, ABA Section of International Law and Practice, and section liaison to the ABA AIDS Coordinating Committee.

David P. Fidler is Associate Professor of Law, Indiana University School of Law at Bloomington. He was chair for the Program on Law and Emerging and Re-Emerging Infectious Diseases at the Section of International Law and Practice of the 1996 annual meeting in Orlando, Florida.

• ***New diseases—new problems:*** This category includes new diseases not fully understood by scientists (e.g., AIDS).

American Communities

The U.S. Centers for Disease Control and Prevention (CDC) emphasizes that infectious diseases increasingly threaten public health and contribute significantly to the escalating costs of health care in the United States. Three infectious disease occurrences in 1993 exemplify today's infectious disease problems in the United States.

• ***Cryptosporidium parvum parasite*** caused the largest waterborne disease outbreak ever recognized in the United States. In Milwaukee, Wisconsin, in April 1993, the municipal water supply (contaminated by viral and parasitic infectious agents) resulted in gastrointestinal illness that affected hundreds of thousands of people.

• ***Escherichia coli 0157:H7 bacteria,*** found in hamburgers served in (at least 93) American fast-food restaurants, caused a multistate foodborne outbreak of severe bloody diarrhea and kidney failure. Data from the ongoing investigation of this outbreak indicate that over 500 children and adults became ill and four children died.

• ***Hantaan virus,*** first detected in the American Southwest in 1993, and previously unknown, was linked to exposure to infected rodents in more than a dozen states. It resulted in lung infection and death for more than half of the 50 persons infected.

Laws Promoting Public Health

As part of the American Bar Association's education process, the International Health Law Committee of the ABA Section of International Law and Practice conducted a program on law and emerging and re-emerging infectious diseases at the 1996 annual meeting in Orlando. The consensus of the participants on this program was that existing domestic and international law on infectious disease control needs reform.

The ABA annual meeting program identified four ways in which lawyers can contribute to U.S. and international public health efforts to control infectious diseases.

• ***Personal awareness:*** Lawyers can read more about the threat posed by emerging and re-emerging infectious diseases to increase their personal awareness about the seriousness and frightening nature of the situation.

• ***Raising awareness:*** Lawyers can raise the legal aspects of emerging and re-emerging infectious diseases through involvement in local, state, national, and international bar activities and organizations.

• ***Participation in lobbying efforts:*** Communications from lawyers and legal organizations to state and federal elected officials concerning legal reform efforts can help create political will in our elected officials.

• ***Reforming the law:*** Lawyers can participate in reforming the law by following the legal reform efforts and offering their time and services as practitioners to the legal reform effort.

Conclusion

Crafting improvements in both domestic and international law should serve to promote good public health and control infectious diseases. American lawyers, and educators at all levels, have opportunities to intervene at the local, state, national, and international levels by encouraging changes in policies, legislation, and regulations that will strengthen public health programs. Being effective starts with education—learning what the successes and problems are concerning infectious diseases worldwide, nationally, in our communities, and in our schools; then supporting effective programs, finding out what is being done by government and nongovernment organizations about problems, and deciding where and how the law and education should intervene.

Resources

U.S. Department of Health & Human Services, Public Health Service, Centers for Disease Control and Prevention. *Addressing Emerging Infectious Disease Threats, A Prevention Strategy for the United States.* Atlanta, Georgia, 1994.

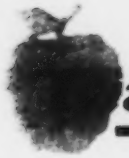
U.S. Senate Committee on Labor and Human Resources. *Emerging Infections: A Significant Threat to the Nation's Health.* 104th Congress, 1st Session, 18 October 1995.

Institute of Medicine. *Emerging Infections: Microbial Threats to the United States, 1992.* National Science and Technology Council Committee on International Science, Engineering, and Technology Working Group on Emerging and Re-Emerging Infectious Diseases. *Infectious Disease—A Global Health Threat, 1995.*

Program Materials. "Law of Emerging and Re-Emerging Infectious Diseases" (paper presented at the annual meeting of the ABA, Orlando, Florida, Monday, August 5, 1996, 43 pp., 5 appendixes). Copies are available from Ms. Sushan Demirjian, Director of Meetings and Programs, ABA Section of International Law and Practice, 740 15th Street, N.W., Washington, D.C., 20005, (202) 662-1667; FAX (202) 662-1669.

World Health Organization, Division of Emerging and Other Communicable Diseases Surveillance and Control. *EMC Strategic Plan* (WHO/EMC/96.1).

World Health Organization, Report of the Director General. *The World Health Report, 1996, Fighting Disease Fostering Development.* Geneva, Switzerland, 1996. ♦



Teaching Strategy

Human Rights—The Answer to Peace?

Mary Louise Williams

Update on Law-Related Education, 21.1, 1997, pp. 9–11. © 1997 American Bar Association.

Background

The concept of human rights has evolved over time and continues to evolve. We wrestle with the need to be more precise in defining what a *right* is and in determining what rights should be recognized and protected. It is basically a question of discovering what is fundamental both to human survival and to the realization of human potential.

Objectives

As a result of this lesson, students will

- Define and explain terms relating to basic needs and rights
- Apply their own experiences to these definitions
- Project the further expansion of these concepts
- Analyze and evaluate the effectiveness and importance of human rights to world peace

Target Group: Secondary
Time Needed: 2–3 class periods
Materials Needed: Student Handouts 1–2, one each per group

Procedures

1. Introduce the concept of basic needs by reading this quotation by Cyrus Vance, former U.S. secretary of state. "[T]here is the right to the fulfillment of such vital needs as food, shelter, health care, and education. We recognize that the fulfillment of this right will depend, in part, upon the stage of a nation's economic development. But we also know that this right can be violated by a government's action or inaction. ..." Then ask students questions such as: What must humans have in order to survive? What do you need that will enable you to develop your full potential? What agent or source—the individual, parents and family, the community, the state, or the federal government—should provide for these basic needs? What happens if the needs are not being provided for? Discuss the answers.

2. Divide the class into groups of three or four students. Ask the groups to extend the earlier discussion of basic needs and the agent(s) that should provide for these needs. Using the board, list the ideas that the groups share with the class. Point out areas of common agreement.

3. Review the definitions of *rights*. Help students distinguish among individual (civil) rights and political, economic, and social rights. Distribute a copy of Handout 1 to each small group. After the groups have completed their lists, have them share their responses with the class.

4. Introduce the concept of human rights. Distribute copies of Handout 2 to the groups. Use the handout as a springboard for further discussion and to help students discover the rapid expansion of human rights definitions and international recognition since 1966.

At the conclusion of the activity, emphasize that many basic needs have become legal rights after they were identified as human rights and protected by law. For example, during World War I, the Army discovered that 20 percent of the men drafted could not read or write. In addition, lack of physical fitness caused 31 percent of the men between the ages of 21 and 31 to be rejected for the draft. As a result, literacy and a healthy childhood gradually became recognized as basic needs. Child labor was legislated against, and education and a healthy childhood were legislated for, as human rights.

5. Debriefing serves as a check to determine whether students understand the material and to correct misconceptions. Use the following as a guide for discussion:

a. How are basic human needs related to human rights? What rights do you think existed in 1776? In 1900? Exist now? How do you explain the rapid changes in how we define what constitutes human rights?

b. Would the world have come to accept the U.N. Declaration of Human Rights had there been no Holocaust?

c. What human rights will be accepted as fundamental to the well-being of citizens of the world in the twenty-first century? Have they been identified?

d. What is the relationship between granting human rights and achieving peace?

Mary Louise Williams, a high school teacher for 28 years, is now an educational consultant in Santa Fe, New Mexico. Recently, she has worked in Turkey with the Umet Foundation on ideas for a Turkish human rights curriculum.

Student Handout 1

Thinking About Rights

Rights have to do with freedoms—to think, believe, and act in chosen ways and to have the means to meet basic needs. Rights are our values recognized in laws and in principles of justice and fairness. They provide a standard of accepted morality essential for human dignity. Legally speaking, they act as a limitation upon governments and their exercise of power over people.

Individual, or civil, rights are those that are essential to an individual's freedom. They provide legal protections against injury, discrimination, and denial of rights by other individuals, as well as governments. Political rights protect activities that allow individuals to participate in the political life of a community and nation. Social rights involve social interactions—living together in communities. They include the right to an education and to health services. They also include the right to the use of public accommodations, such as hotels, parks, and public transportation. Many people believe that social rights prevent discrimination based on race, sex, religion, and ethnic origin. Economic rights are legal protections for economic pursuits or for the right to choose how one earns a living.

List the rights that you believe belong in each category—individual, or civil; political; social; and economic. You may find that some rights could belong in more than one category. Choose only one category for each right, and identify why you placed particular rights in each category. Listed below are some specific rights to help you begin your lists.

Individual, or Civil	Political	Social	Economic

freedom of speech
freedom of religion
equal protection of law
trial by jury
to vote
hold public office
organize political parties
to petition
own personal property
right to an education
own/sell real property (land)
access to public accommodations
access to public transportation
protection of property

Student Handout 2

Human Rights—The Key to Peace?

Human rights have been defined as "universal moral rights or natural rights that belong equally to all people simply because they are human." Human rights have evolved over time and continue to evolve as the international community questions which rights should be universally recognized and protected. What is fundamental to human survival and dignity and to the realization of the human potential? Some people believe that the granting of human rights is critical to world peace. President John F. Kennedy said, "Is not peace, in the last analysis, basically a matter of human rights?"

Before World War I, international human rights law focused primarily on the treatment of alien nationals living or traveling abroad and granted them certain kinds of diplomatic protection. How governments treated their own citizens was of little concern to the international community because the treatment was considered an internal matter. But something dramatic took place after World War II as a result of German Nazi atrocities.

These atrocities revealed to the world the ultimate violation of human rights. New technology had created communication systems that allowed the world to see and hear actual pictures and personal accounts. As the world expressed its horror and disbelief, the new United Nations came into existence. The U.N. emphasized that one of its basic purposes was to promote and encourage "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."

Human rights gained worldwide, symbolic acceptance when the U.N. adopted the Declaration of Human Rights on December 10, 1946, and governments signed it. International human rights law had undergone a dramatic shift from protection of aliens to concern for the way governments treated their own citizens. A statesman observed, "There has been considerable progress. ... The State's monopoly is challenged, and its sovereignty in regard to human rights, yesterday absolute, is being toned down."

Either governments honor humans rights on their own, or they are pressured into it by national or international opinion. Nongovernmental organizations such as Amnesty International monitor human rights violations within nations and then report their findings to the world. This pressures nations to honor the rights of their citizens. One example of a person whose rights were finally recognized is Nelson Mandela of South Africa. A political prisoner for many years in the then apartheid country, he is now a leader in the newly transformed nation.

Look up any of the following excerpts from preambles to treaties or declarations dating from 1776 through 1966. These preambles give insight into the changing definitions and expanding awareness of human rights. Determine what new rights are identified within each excerpt. Do you think these rights help achieve lasting peace? Explain.

- U.S. Declaration of Independence 1776
- The French Declaration of Rights of Man and Citizen 1789
- U.N. Declaration of Human Rights 1948
- U.N. Declaration on the Rights of the Child 1959
- International Covenant on Civil and Political Rights and International Covenant on Economic, Social, and Cultural Rights 1966

Teaching Strategy

War, Peace, and Human Rights: Listening to Children's Voices

Gayle Mertz

Update on Law-Related Education, 21.1, 1997, pp. 12–14. © 1997 American Bar Association.

Background

Since the United States employed nuclear weapons in World War II, the international community has debated how to manage the development and use of weapons of mass destruction (WMD). Concern for the welfare and safety of youth is routinely cited in arguments for and against the proliferation of WMD. While the debate continues, another has gained international attention—what basic and universal rights should be extended to children throughout the world.

The Convention on the Rights of the Child was drafted and presented to the U.N. General Assembly. On September 2, 1990, the convention entered into force after ratification by the necessary 20 nations (the United States was not among them). Ratification came only nine months after adoption, making this the speediest entry into force of any international human rights treaty. As a country ratifies it, the convention becomes binding law for that country.

The treaty is comprehensive, addressing diverse issues like parental responsibilities; protection from abuse, neglect, and torture; protection of a child without family; adoption; health and health services; rights of refugee children; child labor; sexual exploitation; sale, trafficking, and abduction of children; administration of juvenile justice; and the deprivation of liberty.

Gayle Mertz is the Director of the Law-Related Education Network in Boulder, Colorado. Ms. Mertz serves on the American Bar Association Advisory Commission on Youth Education for Citizenship and the Update on Law-Related Education Editorial Advisory Board.

Objectives

As a result of this lesson, students will

- Understand basic international doctrine related to the proliferation and control of WMD
- Understand the Convention on the Rights of the Child's protections of expression, thought, and conscience
- Understand how formally to bring concerns to an international court

Target Group: Secondary students
Materials Needed: Student Handouts 1–2
Time Needed: 4 class periods
Resource Persons: 3 or 4 adult volunteers

Procedures

1. Ask all students to read the article by Bonnie Jenkins on page 26.

2. Discuss the reading assignment and review terms and concepts. Expand the discussion to include ideas and attitudes about how WMD proliferation can affect young people throughout the world. Discuss emotional and physical implications.

3. Introduce students to the concept of international law. Have them read the Foreword by Lucinda Low.

4. Distribute Student Handout 1. Assign each section to one team of two students to read and discuss. Ask each team to report its discussion to the class. Reports should follow the sequence of the preamble.

5. Distribute Student Handout 2. In larger groups, follow the same procedure to report on the articles.

6. Facilitate a class discussion about the pros and cons of adopting such a document. To what extent do its rights resemble the rights students think they enjoy in their community, school, and elsewhere?

7. Explain to students that when a group of people want to bring an issue to the attention of an international court, they can prepare a memorial. Ask students to read "What Is a Memorial?" on Student Handout 2. Students will work in small groups of 4–5 to prepare a memorial that relies on the Convention on the Rights of the Child. Their memorials will express their concerns and suggestions about reflecting the interests of children as the international community sets policy to combat the proliferation of WMD. Ask students to supplement with additional library or Internet material. Allow sufficient time for independent research.

8. Ask each group to write its memorial, which should cite specific items from the preamble and articles; tie these to issues related to the threat of proliferation of WMD; and convincingly present an approach that the international community should take to encourage youth input in problem solving.

9. Invite several resource persons to listen as a panel of judges to each group's presentation and be prepared to question students.

Student Handout 1

The Convention on the Rights of the Child

Adopted by the General Assembly of the United Nations on November 20, 1989

Preamble

The States Parties to the present Convention,

Considering, that in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Bearing in mind that the peoples of the United Nations have, in the Charter reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom,

Recognizing that the United Nations has, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, proclaimed and agreed that everyone is entitled to all rights and freedoms set forth therein, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Recalling that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance,

Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,

Recognizing that the child, for the full harmonious development of his or her personality, should group in a family environment, in an atmosphere of happiness, love and understanding,

Considering that the child should be fully prepared to live an individual life in society and brought up in the spirit of ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity,

Bearing in mind that the need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the United Nations on 20 November 1959 and recognized in the Universal Declaration of Human Rights, in the International Covenant of Civil and Political Rights (in particular in articles 23 and 24), in the International Covenant on Economic, Social and Cultural Rights (in particular in article 10) and in the statutes and relevant instruments of specialized agencies and international organizations concerned with the welfare of children,

Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care including appropriate legal protection before as well as after birth,"

Recalling the provisions of the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally; the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"); and the Declaration on the Protection of Women and Children in Emergency and Armed Conflict,

Recognizing that, in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration,

Taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child,

Recognizing the importance of international cooperation for improving the living conditions of children in every country, in particular in the developing countries, have agreed,

Student Handout 2

Convention on the Rights of the Child: Articles 12–17

These articles afford children the protections below, subject to limitations prescribed by law and necessary to protect public safety, order, health, morals, and others' rights and freedoms.

- The right to express views freely in all matters affecting the child (views given due weight in accordance with age and maturity)
- The opportunity to be heard directly/through a representative or an appropriate body, in any judicial/administrative proceedings affecting the child, consistent with procedural rules of national law
- The right to freedom of expression in any medium and regardless of frontiers
- The right to freedom of thought, conscience, and religion
- The freedom of association and peaceful assembly
- Access to mass media information/material from a wide range of national and international sources, especially those promoting the child's well-being

These articles respect the parents' rights and duties to provide direction to their children in their exercise of rights, in a manner consistent with their evolving capacities. The articles encourage the mass media to disseminate, with the international community's cooperation, information and material of a social and cultural benefit to the child, keeping mindful of minority/indigenous children's linguistic needs and following guidelines to be developed for protection from injurious information and materials.

What Is a Memorial?

A *memorial* is a document comparable to a brief that is submitted to an international court or panel. As you prepare your memorial, include:

1. **Jurisdiction of the court,** explaining why the court/hearing officers have the right to hear the case. Cite the elements of the Convention on the Rights of the Child that create jurisdiction.
2. **Question and issues** that you are going to present or argue.
3. **Statement of facts,** an unemotional, step-by-step description of facts/theories that support your case/argument.
4. **Argument summary,** where you summarize how your facts relate to your arguments.
5. **Conclusion,** or why the facts and arguments you presented should result in a favorable ruling. Tell exactly what ruling you are requesting.
6. **Index,** or list of laws and treaties you used in developing your case.

Tradeoffs Associated With Fighting Terrorism

Some freedoms must be compromised for safety's sake.

Stuart H. Deming

Update on Law-Related Education, 21.1, 1997, pp. 15–16. © 1996 American Bar Association.

Terrorism has struck United States citizens in foreign settings, such as in the Pan Am 103 disaster over Lockerbie, Scotland, on December 21, 1988. It has struck in domestic environments, such as in the bombing of the World Trade Center in New York on February 26, 1993, and in the destruction of the federal building in Oklahoma City on April 19, 1995.

Every government, regardless of its political philosophy, is under the ultimate obligation to protect its citizens. And there should be a sense of urgency in doing so. This urgency may require democracies to accept tradeoffs. This may include an infringement of individual rights, even to the extent that protective measures encroach on individual rights and, in time, may ultimately undermine the very nature of a free society.

The first signs of the terrorism that we have come to know today first arose nearly 30 years ago when a series of skyjackings took place. Before that, anyone boarding an airplane in the United States was not subject to search. There were no metal detectors or passenger frisks. One simply arrived at an airport, purchased a ticket, and got on a plane. After a number of incidents in which persons armed with weapons demanded to be flown to Cuba made the news, things changed. Metal detectors were installed, and frisking and questioning by airport officials became commonplace occurrences.

The Fourth Amendment of the Constitution of the United States provides for the freedom from unreasonable search and seizure. Historically, this has meant that there has to be probable cause—suspicious activity—for someone to be searched. Merely showing up at an airport does not constitute probable cause. It is neither suspicious nor likely to cause harm. As a society, however, we have given up some of our rights in order to deter acts of terrorism that may be directed at us.

In a similar context, unknown to many in the United States, we have also lost some of our First Amendment rights. The First Amendment provides for the right of free speech. Normally, one cannot be imprisoned or fined for what he or she says—unless it is libel or slander. Not so in an airport or on an airplane. Any reference to a bomb in these locations may lead to immediate arrest and detention. It makes no difference whether such a comment was made in a joking manner. Over the years, there have been more than a few occasions in which law-abiding citizens have been arrested and detained for talking about bombs or hijacks. Even yelling "Hi, Jack!" to a friend named Jack while boarding a plane may not be appropriate. This is like screaming "Fire!" in a crowded theater and could cause a panic that could result in personal harm.

Nonetheless, it is a shock to many Americans when innocent conversation can lead to an arrest. Usually someone is merely detained. But this detention is just one example of how steps to protect citizens can, over time, lead to an abridgment of their rights.

In the short term, heightened security at airports means longer lines and greater delays. Passengers have to check in much earlier, and their luggage is subjected to extensive searches. Air travel thus becomes less convenient and more costly. New equipment will have to be installed at airports throughout the U.S.—at an estimated cost of $2 billion. Questions have been raised as to the effectiveness of this new equipment. However, because of suspicions raised about the TWA 800 disaster in which an airplane exploded in midair in the summer of 1996 and the potential for other disasters, Congress and the president are expected to approve expanded

Stuart H. Deming is a partner with the law firm of Inman Deming, L.L.P., with offices in Washington, D.C., and Kalamazoo, Michigan. He previously served as the chair of the International Law Committee of the ABA's Section of International Law and Practice.

security requirements. Over time, more and more of the costs of airport security will be borne directly by passengers through higher ticket prices.

Deportations

Terrorism is most often associated with nationals of countries other than the U.S. As a result, the ability of the Immigration and Naturalization Service (INS) to deport aliens suspected of terrorist activity has been broadened. Previously, deportation proceedings involved a seemingly endless series of administrative hearings, while aliens with suspect intentions who made claims for political asylum were allowed to remain in the United States. As often as not, these aliens were free to carry on their affairs in the same manner as citizens during the administrative process.

Now, however, the INS can take rather immediate and drastic steps to detain and deport suspicious aliens. This came about as a direct result of the bombing of the World Trade Center in New York. Many of the individuals involved were aliens who had come to the U.S. seeking political asylum, and their status was still pending review of their applications. At the time, all an alien needed was a claim for asylum, and the applicant was allowed to go free, often for years, while his or her status was clarified.

Under the new rules, the INS can hold and deport aliens whom it suspects of terrorism. There is no longer a presumption that they are entitled to a series of hearings before they are placed in a detention center. On entry to the U.S., foreign nationals are no longer entitled to the same rights afforded to a citizen or a resident alien.

Once again there is a tradeoff. There are and will be many situations in which innocent people are unable to enter the country due to unfounded suspicions. While most government officials exercise great care and compassion in carrying out their responsibilities, unchecked power inevitably leads to abuses. Without a right to challenge the INS through administrative hearings or in court, aliens are likely to suffer some injustices.

Wiretaps

Another response to terrorist activity has been a loosening of the requirements for wiretaps. Whether aimed at foreign or domestic terrorism, wiretaps can be an effective tool in discovering and thwarting terrorist activities. The ability to listen in on selected communications enables law enforcement officials, such as FBI agents, to probe the workings of illegal groups and gain a clearer understanding of their intentions.

"Loosening," in this instance, is the key word. It is rare in today's world that any individual or group can accomplish anything without the use of telecommunications. And in the U.S., there are still limitations on the use of wiretaps and government intrusion due to an overriding sense of privacy. Indeed, in many states, it is illegal for private citizens to record telephone conversations without the permission or knowledge of the other participants.

Many of the limitations on the use of wiretaps were established because of past abuses. Wiretaps were originally put in place to combat organized crime and to deter espionage during war, but they were later used to check on the activities of groups thought to be subversive. However, how subversion is defined depends in part upon one's political views.

Probably the most noted abuse of telephone tapping was the infiltration of the Civil Rights movement in the late 1950s and 1960s. One particular example of this abuse was a massive effort to monitor the activities of Martin Luther King, Jr., who was suspected of communist activity. That, of course, was never confirmed, but the tapping went on for many years, including throughout the Kennedy and Johnson administrations. Later, wiretaps were placed on the phones of persons involved in the anti-war demonstrations of the late 1960s and 1970s.

It should be pointed out, however, that wiretaps were also used to apprehend individuals responsible for terrorist activities against civil rights workers during the same time period. That is just the point. Steps taken to deter terrorist activity can be abused and turned on the very people for whom the steps were taken to protect. While any government must take actions to deter and apprehend those responsible for terrorism, there must be countermeasures in place to assure that those actions are not abused. ♦

Immigration ...

continued from page 5

tions on nonimmigrant visas that may be issued or persons who may enter on nonimmigrant status except for H-1Bs, which are limited to 65,000 per year, and H-2B visas. In 1994, more than 22 million nonimmigrants were admitted to the United States.

How do we reconcile the humanitarian concerns of providing economic opportunity and refuge for those born abroad and the shortages perceived by U.S businesses in certain highly skilled jobs such as engineers and scientists for which no U.S. workers are available? How do we protect the jobs of U.S. workers in a global economy? How do we decide whom to let in and whom to keep out to meet these various needs? Is immigration a net benefit or loss to the U.S. economy? The immigration system, which is the result of political tugs and pulls, is far from perfect. The Congress continues to amend it; difficult issues remain. ♦

A Seedling in Sarajevo

The American Bar Association boosts a new world court.

Homer E. Moyer, Jr.

Update on Law-Related Education, 21.1, 1997, p. 17. © 1997 American Bar Association.

Overshadowed by news of foreign armies arriving to enforce the peace, an event earlier this year in Sarajevo quietly captured both the hopes and obstacles facing this war-ravaged country. The unlikely occasion was the inaugural session of the new constitutional court of the Federation of Bosnia and Herzegovina. Nothing about the occasion could be called routine.

The building in which the new court met, like most of Sarajevo, bears scars of shells and shrapnel. As Muslims and Croats exchanged gunfire in nearby Mostar, the court's nine judges filed by thick sandbag fortifications and entered Sarajevo's Presidency Building. They then climbed four floors to a large, dimly lit room with windows of plastic sheeting to begin their work.

Six of the judges were Bosnians—two Croats, two Muslims, and two Serbs. Although normal dealings among diverse Sarajevans have historically not been uncommon, they are rare outside the city, where evidence of horrific atrocities continues to accumulate. On the fourth floor of the Presidency Building, however, the six Bosnian judges collaborated quietly and effectively on matters of court organization and procedure.

Homer E. Moyer, Jr., practices law in the Washington, D.C., office of Miller & Chevalier, and is chair of CEELI, the American Bar Association's Central and East European Law Initiative.

Even more unlikely than the Bosnian judges were the other three judges of the court—one Belgian, one Syrian, and one Nigerian. Having arrived on a U.N. flight that had been delayed for fear of morning gunfire, they readily joined in the deliberations through Bosnian interpreters.

ABA Involvement

That a national court includes three foreign justices may be, as the Federation's foreign minister said, "unprecedented beyond unprecedented." Or, as the Nigerian justice summed it up, "It is not just innovative; it is unheard of." The Belgian member reminded his colleagues, however, that his own small country is successfully inhabited by three different cultures that function in three different languages.

Perhaps most anomalous of all, however, was the court's principal facilitator and booster. In a country with European legal traditions, a large Muslim population, and de facto German currency, it is CEELI, a voluntary project of the American Bar Association launched by the Section of International Law and Practice, that has nurtured this fledgling court. In 1995, CEELI provided training for the judges in the U.S. and, for the inaugural session, brought the three foreign judges to Sarajevo. In Sarajevo, CEELI representatives were welcomed by the court as "both our guests and our hosts."

But most impressive to observers of Bosnia's traumas is the mix of two justices from each ethnic constituency. For each of these justices, the fratricidal conflicts in Sarajevo have been real and personal. Of the six, two have had children killed by this war. Robert Kaplan's *Balkan Ghosts* speaks of the region in terms of "social disintegration and the triumph of violence and sexual instinct over the rule of laws." Yet it is here that Muslim, Serb, Croat, and international justices developed court rules, elected a president, and debated whether wearing robes would be dignified or pretentious.

As the judges worked into the night, a rocket grenade struck a tram several hundred yards away. The next day at the inaugural session, the court's new president voiced the hope that through the court "the power of weapons in this war will be replaced by the power of argument, justice, and law." One of the earlier victims of the war had been the judge's nine-year-old son, who was killed while playing in his front yard.

Rule of Law

In the United States, the institutional basics of the rule of law have long since been taken for granted. In many ways, the term has become a cliché. In a country like Bosnia and Herzegovina, however, it is a vital, elusive objective that stands between a war-riven society and normal life. It is, as our ambassador John Menzies reminded us, "a prerequisite to civil society."

Amid the destruction of Sarajevo, the modest beginning of this improba-

continued on page 52

20

Teaching Strategy

Freedom of the Press in an International Perspective

Barbara Miller

Adapted from Barbara Miller, "Freedom of the Press in an International Perspective," Education for Freedom (Denver: First Amendment Congress, 1996), by permission of the publisher.

Background

The degree of freedom that journalists in the United States have to report and analyze the activities of government leaders is both admired and questioned in other parts of the world. This lesson provides students with the opportunity to compare the role of the press and citizen access to information about government in countries around the world with the role and access in the United States.

Objectives

As a result of this lesson, students will

- Compare limits on freedom of the press in the United States with those in other countries
- Explain how the First Amendment prevents abuses of freedom of the press that are found in other countries
- Describe methods of limiting expression in totalitarian countries

Target Group: Secondary students
Time Needed: 2–3 class periods
Materials: Tables (p. 19), map (pp. 20–21), Student Handouts 1–2

Procedures

1. Provide students with a copy of the tables on page 19 and the map on pages 20–21. Briefly review the criteria for rating countries: 60 percent of the rating is based on institutional control of the media, the extent to which laws restrict the content of the news, the degree of political or government control over the news media, and the economic influences on the media by government or private entrepreneurs. The other 40 percent is based on opposition to journalism, ranging from killing journalists to censoring material. Both print and broadcast media are rated. Point out that in parts of the world with high rates of illiteracy, radio and television are the most important sources of information.

2. Provide a series of questions for students to answer using the map and tables: Which continent has the largest number of countries in which the media are not free? Which continent has the highest number of countries in which the media are free? Is the trend toward greater or lesser freedom of the press? What percent of the world's population gets information from a free press? Pick out one or two countries that are presently in the news and explore reasons for their ratings. Then ask students to work in pairs to develop additional questions that are raised by the data (or generalizations that can be made from the data) on the tables. List their findings and save for possible use in step 5 or the first Enrichment/Extension activity.

3. To help students gain an understanding of the rationale for proponents and opponents of a free press, have them read Student Handout 1. Explain that you want them to use the information to develop a tentative answer to this question: When should government have the right to prevent the press from publishing information? As they read, students should consider the following questions: How do democratic and nondemocratic governments differ in their practices concerning censorship? Which of the reasons for censorship seem most defensible? Which seem the least defensible? Which reasons and methods seem the most likely to occur in the United States? If students were dictators, which methods would they find more important?

4. Distribute Student Handout 2. Assign small groups of students to use this handout and the other materials you furnished them to prepare one or more cases for presentation to the class. You may wish to make this a research assignment using the sources listed in the Resources section. You may also need to provide some additional background on the relationship between press freedom and the history and experiences of a nation, using the United States as an example, and to outline what would go into a report. (For example, the U.S. experience with freedom of the press is shaped by Thomas Jefferson's statement that it would be better to have newspapers without government than government without newspapers. Also discuss the earliest era of our nation during which citizens were suspicious of government and relied on such journalists as Peter Zenger. The story of freedom of the press has also been shaped by landmark Supreme Court cases, including *Sullivan v. New York Times* and the Pentagon Papers Case.)

Barbara Miller is a senior staff associate at the Social Science Education Consortium in Boulder, Colorado, and one of the developers of the newly revised Education for Freedom *published by the First Amendment Congress in Denver.*

5. Conclude by discussing each case in Student Handout 4 and some of the questions generated during step 2.

6. Evaluate student understanding of how freedom of the press differs throughout the world by assigning the following essay question: Under what conditions, if any, should the government have the right to limit the power of the press? If the U.S. standard is a good one, what should U.S. citizens and the government do to promote freedom of the press in other nations?

Extension/Enrichment

1. Encourage students to continue researching the questions they generated in step 2 of the Procedure. A section of bulletin board could be set aside for students to post the results of their research.

2. Invite a journalist who has spent time in another country to visit the class and talk about his or her perceptions of freedom of the press in that country. Did restrictions on press freedom exist? Did they affect how U.S. journalists worked? Why or why not?

Student Resources

If you want students to conduct additional research during the lesson, you may want to gather information from such sources as:

The Committee to Protect Journalists (publisher of *Attacks on the Press in 1995: A Worldwide Survey*), 16 East 42nd Street, New York, NY 10017; (212) 465-1004. FAX (212) 465-9568; e-mail: info@cpj.org; web site: http://www.cpj.org

Freedom Forum World Center, 1101 Wilson Boulevard, Arlington, VA 22209; (703) 528-0800; FAX (703) 511-4833; web site: http:/www.freedomforum.org

Freedom House, 120 Wall Street, Floor 26, New York, NY 10005-3904; (212) 514-8040.

Human Rights Watch, 485 Fifth Avenue, New York, NY 10017-6104; (212) 972-8400; FAX (212) 972-0905.

World Press Review (a journal containing clippings from newspapers around the world and information about freedom of the press from an international perspective), 200 Madison Avenue, Suite 2104, New York, NY 10016; (212) 889-5155; FAX (212) 889-5614.

Freedom of the Press Statistics

Regional Assessment of Press Freedom by Countries

	Free	Partly Free	Not Free	Number of Countries
Africa	7 (14%)	21 (40%)	24 (46%)	52
Asia (incl. Middle East)	6 (12%)	17 (35%)	26 (53%)	49
Europe (E & W)	24 (63%)	9 (24%)	5 (13%)	38
Latin Am./Caribbean	17 (50%)	16 (47%)	1 (3%)	34
North America	2 (100%)	0	0	2
Oceania	9 (75%)	3 (25%)	0	12
			187	

(% shows percentage in each category in the region)

Changes 1995 to 1996

	One Category to Another		Within Categories			
	Improved	Declined	Improved	Declined	Unchanged	Total No.
Africa	3	1	23	15	10	52
Asia	2	2	19	14	12	49
Europe	2	0	18	12	6	38
Lat. Am.	0	1	16	9	8	34
N. America	0	0	0	2	0	2
Oceania	0	0	8	3	1	12
Total	6	4	84	55	38	187
%	3%	2%	45%	30%	20%	100%

Press Freedom 1996 187 Countries and Populations

	By Country	By Population (millions)
Free	64 (34%)	1,229.07 (22%)
Partly Free	65 (35%)	2,174.05 (38%)
Not Free	58 (31%)	2,298.37 (40%)
	187 (100%)	

BEST COPY AVAILABLE

Freedom of the Press

BEST COPY AVAILABLE

BEST COPY AVAILABLE

Student Handout 1

International Perspectives on Censorship

Article 19 of the Universal Declaration of Human Rights Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers.

First Amendment of the U.S. Constitution Congress shall make no law . . . abridging freedom of speech or the press.

Background Each nation, including the United States, has set some limits on the role of the press to report the affairs of government. The degree of freedom that the press enjoys in various nations is subject to political, economic, and ethical constraints of nations and cultures.

As illustrated in the Map of Press Freedom (Student Handout 2), countries can be divided into three categories for purposes of measuring freedom of the press:

Not Free—Repressive Governments. At one extreme of the continuum are countries with one-party rule in which the press is a tool of the government. The media are used by the government as a means of indoctrination. One Albanian journalist has described his work as "an intellectual passion, not a real profession." Prior to 1983, Romanian authorities maintained the power to decide who could possess a typewriter. A government agency was responsible for tracking the production, use, and maintenance of typewriters and ink. Ownership of copy machines and materials was restricted to socialist organizations, and private persons could make copies only at authorized locations.

Partly Free—Emerging Democracies. The relationship between the press and the government in new democracies is very fragile. Many of the world's governments have enshrined press freedom in their constitutions but feel free to ignore it to maintain a stable government.

Free—Long-Established Democracies. Industrialized Western nations generally provide journalists with a great deal of access to information about government and freedom to provide the public with the information. Among these nations, there are varying limits on the freedom to publish. The First Amendment to the U.S. Constitution provides journalists with the least restrictive environment for reporting about government activities. Even in the United States, however, there are calls to reconsider existing policies related to developing a more "responsible" press.

Why Governments Resist Freedom of the Press *Many reasons are given for press censorship. Here are some examples:*

- **Patriotism** Our nation is in crisis—we cannot tolerate destructive criticism. The reputation of our leaders must be protected.
- **Cultural** Our culture cannot thrive on Western concepts of freedom. Placing too much emphasis on the rights of individuals limits what's good for the nation. Freedom of the press interferes with order and stability.
- **Economic** When the press attacks our nation and leaders, it undermines development.
- **Idealism** We must limit press stories that will spread racial and ethnic hatred.
- **Privacy** Privacy is recognized by international human rights laws as having respect for a person's private life, home, and correspondence. A free press often violates privacy.
- **Sedition** In every nation, it is a crime to plot the violent overthrow of a government.
- **Public Morals/Obscenity** Explicit sexual messages are harmful.
- **Freedom of the Press Conflicts With Other Rights** Reporting the activities of government must be balanced against other important rights such as the right of the accused to a fair trial.

Ways Governments Control the Media *The methods governments use to control the media are also numerous:*

- Establish "Press Councils" with the power to "ensure high press standards"
- Withhold government advertising
- Restrict the availability of newsprint or place taxes on newsprint
- Jam radio and TV broadcasts
- Issue court orders when rights of the press conflict with other rights
- Enact prior restraint laws prohibiting types of messages from certain organizations or individuals
- Limit who has the right to typewriters/computers and newsprint

Self-censorship is the most common form of censorship in the 1990s. Journalists are particularly vulnerable to limiting what they say when they know that what they say may result in hardship for their families.

Student Handout 2

Case Worksheet on Freedom of the Press

1. Find the country on the map and draw an outline of the country and give its rating.
2. Read the case and explain the following:
   a. Reasons given for censorship.
   b. Methods used to censor material.
   c. How would this case be handled in the United States?
   d. What historical experiences in this country might explain limiting the press? What cultural factors might explain the limitation?
   e. What can the citizens of this country do about the limitation on the freedom of the press? What can journalists within this country do?
   f. What should outside forces do, if anything, to promote freedom of the press in this country? To provide alternative sources of information?

Case Backgrounds

Russia

In Russia, authorities filed criminal charges against NTV for a puppet show that satirized government leaders.

A Moscow court sentenced a popular journalist to a year of labor in 1995 for calling the Defense Minister a thief. The editor of *Moskowsky Komsomolets* published an article alleging that Defense Minister Grachev diverted army funds to buy Mercedes Benz cars for himself. The prosecutors investigating the accusation dropped the case, saying that President Yeltsin approved the purchases. The judge found the journalist guilty of deliberately insulting Grachev "in an indecent way" and sentenced him to a year at a government-specified job. He must also give up 30 percent of his salary.

Freedom Rating: 58, Partly Free

Nigeria

Dap Olorunyomi's new publication, *The News*, was closed down in 1992 when he questioned the military power within the newly formed civilian government. The Nigerian government interfered with the publication and distribution of the paper in several ways. Security forces kept the magazine offices under surveillance, occupied their offices and seized thousands of copies of the magazine, detained the senior editors, and took reporters away and assaulted them. The editors responded by going underground, changing printers, and spreading the work among several printers. Olorunyomi and his colleagues then started a new publication called *Tempo*. After a year in hiding, he escaped Nigeria with help from an international group—The Committee to Protect Journalists.

Freedom Rating: 92, Not Free

United Kingdom

In Britain, a 1988 ban prevents the media from broadcasting direct statements from leaders or spokespersons for 11 organizations—some nationalist, others unionist—that have either been outlawed by the government as terrorist groups or, like Sinn Fein, deemed sympathizers.

In England unlike in the United States, the burden is on journalists to assert that everything they write is the truth. Under England's strict liability laws, a person may publish a statement that he or she believes to be true, but if the statement turns out to be false, the journalist will be liable regardless of how "excellent his intention."

Freedom Rating: 22, Free

War Crimes Tribunals: A Permanent Criminal Court?

War-related crimes have proliferated to such an extent that a new court may be in order.

James E. Dorsey and Kristi Rudelius-Palmer

Update on Law-Related Education, 21.1, 1997, pp. 24–25. © 1997 American Bar Association

In February 1993, after decades of discourse over the advisability of establishing a permanent international criminal court and in response to the universal outrage over the widely documented war crimes that were committed in the former Yugoslavia, the United Nations Secretariat and Security Council finally established an international criminal court formally known as "The International Criminal Tribunal for the Former Yugoslavia." The judges appointed to the tribunal quickly drafted and adopted rules of procedure and evidence.

The tribunal has four goals: (1) stopping the commission of war crimes, (2) bringing perpetrators to justice, (3) ending the cycle of crime and recrimination between the contending parties, and (4) documenting the crimes for history before the guilty can attempt to rewrite the historical record.

James E. Dorsey is a shareholder of the law firm of Fredrikson & Byron, P.A. in Minneapolis, Minnesota, and a founder and past president of the Minnesota Advocates for Human Rights. Currently he serves as chair of the International Human Rights Committee of the Section of International Law & Practice of the ABA. Kristi Rudelius-Palmer is co-director of the University of Minnesota Human Rights Center in Minneapolis, which specializes in human rights, war crimes, and international tribunals.

In theory, the Yugoslav Tribunal is similar to the Nuremberg Tribunal, by which Nazi war criminals were tried following World War II. However, by contrast, the Yugoslav Tribunal has a small staff of prosecutors and investigators. Also, unlike the situation after World War II, the United Nations does not control the territory of the former Yugoslavia the way the Allies controlled Germany, nor does the United Nations have ready access to the documents and other evidence located in the former Yugoslavia. Most distinctly, the Serbs, unlike the Nazis, remain a viable political and military force with the capability of resisting orders of the tribunal to turn over accused Serbs. Finally, notwithstanding contentious debates about the issue, the United Nations Implementation Force (IFOR) in the former Yugoslavia does not have the power to arrest those who are suspected of human rights violations.

Yugoslav Tribunal's First Trial

The first trial by this tribunal began on May 7, 1996. The accused is Dusan (Dusko) Tadic, 40, a former cafe owner, karate instructor, and police officer from Bosnia, who has been charged with 13 killings and the beating and torture of many others in May, June, and July 1992. Though indictments have been brought against 22 Serbs, including former Bosnian Serb president Radovan Karadzic and military commander General Ratko Mladic, the tribunal has been able to bring only one, Tadic, to trial.

The trial is taking place in one of the tribunal's two trial chambers (the tribunal also has an appeals chamber) located in The Hague, about 35 miles from Amsterdam in the Netherlands. The Hague is also the location of the International Court of Justice (ICJ), which is sometimes known as the World Court. However, the tribunal, which investigates and prosecutes individuals for certain major crimes, is not related to the ICJ, which deals with civil disputes between nations.

The tribunal's courtroom is state-of-the-art with simultaneous video and audio translation of proceedings in English, French, and Serbo-Croat. Color monitors in front of each participant display an instantaneous transcript of the proceedings. The monitors are also used to display visual and documentary evidence. For their protection, witnesses may testify with altered voices and disguised faces via telecommunications from remote locations.

Tadic's main defense appears to be alibi. When his turn to present evidence comes, he will claim and his lawyers will argue that he simply was not at the scene of the crimes when they took place.

There is no jury. The three members of the judicial panel—Gabrielle Kirk McDonald (presiding judge) from the United States, Lal Vohrah from Malaysia, and Sir Ninian

Partners in Human Rights Education

The Partners in Human Rights Education Program is a grassroots education initiative established by the University of Minnesota Human Rights Center and Minnesota Advocates for Human Rights in 1992. The Partners Program uses the Universal Declaration of Human Rights to introduce international human rights and responsibilities to students of all ages. Each fall the Partners Program trains three-person teams of volunteer teachers, lawyers, and community resource people to teach human rights in the classroom. For more information, call the Partners in Human Rights Education Program at (612) 626-0041.

Stephen from Australia—will determine the facts and decide whether the defendant is guilty beyond a reasonable doubt. If convicted, the defendant faces a maximum sentence of life imprisonment to be served in one of the 11 countries (the United States is not one of them) that have agreed to house tribunal prisoners.

The tribunal has confronted a number of issues that had not been addressed by the United Nations when it created the tribunal. For instance, the whole question of what sort of representation the defendants are entitled to has now been addressed by the tribunal. As a result, the tribunal is now paying for what amounts to public defenders as well as investigators and staff to assist Tadic with his defense.

The Rwanda Story

In November 1994, following the genocidal bloodbath in Rwanda, the Security Council established a tribunal to prosecute human rights offenders in Rwanda. The Rwanda Tribunal will use the same prosecuting office as the Yugoslav Tribunal.

In the aftermath of the creation of these two tribunals, the International Law Commission (ILC) has put together a draft statute for a permanent international criminal court to take the place of these *ad hoc* tribunals. The United States government, however, has a number of reservations about the creation of such a permanent court. While the United States seems to have no problem with a permanent court having jurisdiction over war crimes, crimes against humanity, and genocide, it will still insist that any such cases before the court are referred to the court by the United Nations Security Council. Beyond that, the United States has not been enthusiastic about the creation of broader jurisdiction for such crimes as drug trafficking, apartheid, aggression, and crimes under international law, generally. The United States may also have reservations about whether crimes under the international conventions dealing with terrorism should fall in the new court's jurisdiction as well.

The reasons for the United States's reluctance to support fully the contemplated permanent court appear to be (1) the United States is leery that the court might be used for political purposes adverse to the interests of the United States and (2) the United States does not want the court to get in the way of its own efforts, at both the national and international level, to combat international crime. The first concern is seen in the United States's requirement that the Security Council must refer a charge of war crimes, crimes against humanity, or genocide to the court before it can exercise jurisdiction. The second concern is reflected in the United States's desire to exclude drug trafficking from the court's jurisdiction—the United States already has its own international anti-drug operations.

The current tribunals for Yugoslavia and Rwanda reflect the inability of individual nations to deal with war crimes in an effective manner. In the face of the unconscionable crimes that have been committed in Yugoslavia and Rwanda, it is not surprising that the United Nations was able to find the political will to create the current tribunals. The success of these tribunals may have some bearing on whether the United Nations is able to agree to a permanent court to deal with these problems in the future.

Resources

Horne, William, and Hillary Kessler. "Tadic Trial Primer." *American Lawyer*.

Murphy, John F. "Prospects for a Permanent International Criminal Court." *World Order Under Law Reporter*, Spring/Summer 1995.

Scharf, Michael P. "The International Criminal Tribunals for Yugoslavia and Rwanda." *World Order Under Law Reporter*, Spring/Summer 1995.

♦

Career Opportunities

James Rodehaver, a law student at Washington and Lee School of Law in Lexington, Virginia, worked as a deputy human rights officer for the U.N. office in Belgrade, Serbia, making three-to-four-day excursions into Bosnia to investigate sites destroyed in war. "I would do research concerning possible human rights violations in the areas we searched, and also determine which international treaties were applicable in those areas," Rodehaver says. "The opportunity to work in Bosnia ... enabled me to see how much impact the law has in the world."

The laws Rodehaver worked with were mainly humanitarian and international laws of warfare enacted by the World Community of Nations and revised by the League of Nations in 1909. "I would like to ... become a human rights clerk in refugee law," he says. "There are many exciting job possibilities with the U.N."

Combating the Proliferation of Weapons of Mass Destruction

How nuclear, biological, and chemical weapons, and the means to deliver those weapons, threaten our planet

Bonnie Jenkins

Update on Law-Related Education, 21.1, 1997, pp. 26–28. © 1997 American Bar Association.

The term *weapons of mass destruction* (WMD) refers to chemical, biological, and nuclear weapons, and the means to deliver those weapons (e.g., missile delivery systems). The term *nonproliferation of weapons of mass destruction* refers to those goals and steps taken by a nation to combat the spread of such weapons to nations that try to obtain or develop them.

The countries that attempt to develop or obtain these weapons are referred to as "nonpossessor states," and the countries that have them are referred to as "possessor states." The possessor states differ for each type of weapon listed above. In recent years, there has been an increase in the proliferation of WMD in some nonpossessor states.

The Threat

The threat of proliferation of WMD was clearly demonstrated during the Persian Gulf War in 1991. During that conflict, Saddam Hussein, of Iraq, fired Scud missiles against U.S. and allied troops and civilian populations. Iraq also possessed an extensive chemical arsenal. Hussein used such chemical weapons against Iraq's Kurdish minority in 1988, killing an estimated 5,000 people, and against Iranian forces during the Iran/Iraq conflict. At the time of the Persian Gulf conflict and thereafter, it was discovered that Hussein possessed weapons with biological agents and a well-advanced nuclear weapons program (United Press International 1996).

A more recent use of chemical weapons occurred on March 20, 1995, when a Japanese religious group released nerve gas on a Tokyo subway. At least 12 people were killed and 5,500 people injured (Associated Press 1995). The use of these weapons against civilians in a busy subway highlights the threat that exists when WMD are in the hands of a belligerent or disgruntled person or group.

Even more recently, in August 1996, it was confirmed that Iran has an arsenal of biological weapons and the means to deliver them, including the ability to drop them from Soviet-era attack aircraft and missiles (CIA 1996). Iraq and Libya have purchased or developed ballistic missiles. These nations are the leaders in seeking nuclear, chemical, and biological weapons (*Washington Times* 1996). Recently, Syria conducted tests of Scud missiles. These missiles have a half-ton warhead and can be armed with chemical and biological agents (Associated Press 1996).

Contributing Factors

Many factors lead a nation to develop or acquire WMD. Some nonpossessor states believe they must develop or obtain WMD for national security reasons. Regional tensions may cause states to feel less secure, in addition to domestic tensions within a state that may cause the government of that state to look at such weapons as a means of reducing unrest. Most of these weapons, in particular, chemical and biological weapons, are easier and cheaper to produce than many conventional weapons. (Chemical weapons have been referred to as the "poor man's nuclear bomb" because they are relatively inexpensive to make and do not demand the elaborate infrastructure required to manufacture nuclear arms.) This, coupled with the fact that technology advances make it easier for many more nations to develop these weapons, results in proliferation.

The breakup of the Soviet Union has freed many engineers, scientists, and technicians who once worked on the development of WMD to leave their homelands. Some work in nonpossessor states that pay handsomely for their knowledge and work on related projects. In addition, the breakup of the Soviet Union has resulted in an opportunity for its citizens to make a great deal of money by selling tech-

Bonnie Jenkins is a member of the New York Bar and is employed by the U.S. Arms Control and Disarmament Agency in the Office of General Counsel in Washington, D.C. Interpretations, opinions, or conclusions in this work should be understood to be solely those of the author and should not necessarily be attributed to the U.S. Arms Control and Disarmament Agency or to the U.S. Government.

nology used to develop WMD on the black market.

Many of the items and technologies needed to develop WMD are considered "dual-use items," which means they can be used for peaceful purposes as well as for weapons—and may therefore be obtained with few restrictions. For example, the chemicals used to produce plastics and fertilizer or process foodstuffs may also be used to manufacture chemical nerve agents. Some of the technology used for developing a space launch program, a legitimate program, may also be used to develop a ballistic missile to deliver WMD. In addition, virtually all of the equipment used for a biological-weapons program may be used for legitimate purposes.

What Is Being Done

A predominant method used to combat the threat of proliferation of WMD has been in the area of international law, specifically, treaties. In this area, treaties have been used either to reduce the number of WMD that already exist or to prevent countries from developing or obtaining WMD that they do not already possess.

The Nuclear Non-Proliferation Treaty (NPT)

A major step in combating proliferation of WMD is the NPT. As the name of the treaty implies, its primary goal is to prevent the spread of nuclear weapons. The treaty prevents the states that do not possess such weapons from developing or acquiring them and prevents the states that do possess such weapons from transferring them to states that do not have them. The declared states that possess these weapons are the United States, the Russian Federation, France, China, and the United Kingdom. The NPT has been successful in helping prevent nuclear proliferation and promoting international regional security, encouraging agreement on major reductions of nuclear armaments, and promoting international cooperation in peaceful uses of nuclear energy (Treaty 1968).

The Strategic Arms Reduction Treaties (START I and START II)

In an attempt to reduce the existence of strategic armaments that are used to deliver WMD in the United States and Russia, START I and START II were signed. The full implementation of both treaties will achieve deep reductions in strategic nuclear forces as well as enhance strategic stability by eliminating destabilizing weapons systems. Together both treaties will cover more than 14,000 nuclear weapons (START I 1991 and START II 1993).

Biological Weapons Convention (BWC)

Another treaty that combats proliferation of WMD is the BWC. States that are parties to this treaty are obligated not to develop, produce, stockpile, acquire, or retain biological agents for weapons. States can, however, retain biological agents for other purposes (Convention 1972).

Chemical Weapons Convention (CWC)

The CWC, which was completed in 1993, will enter into force in April 1997. Under the terms of the CWC, all states bound by its obligations cannot develop, produce, acquire, stockpile, retain, or transfer chemical weapons or assist anyone in acquiring such weapons. In addition, chemical weapons already stockpiled by a state party would have to be destroyed (Convention 1993).

Regional Arms Control

The effect of international law on nonproliferation of WMD can also be seen in the regional arms control area. There have been a number of treaties that have contributed to nonproliferation in specific regions of the world.

The 1967 Treaty for Prohibition of Nuclear Weapons in Latin America and the Caribbean (UST 1967), also known as the Treaty of Tlatelolco, represents the first effort by a group of states to establish a nuclear-weapons-free area in a heavily populated region. The states that are parties to this treaty are obligated under international law not to acquire, manufacture, test, or use a nuclear weapon anywhere nor to station a nuclear explosive device in their territories. There are similar treaties involving states located in the South Pacific region, the African region, and the Southeast Asian region.

What Can Be Done

It will probably be impossible to prevent all future proliferation of WMD. As technology continues to advance, it will continue to become easier for a nonpossessor state to develop these weapons. The development of chemical and biological weapons will remain relatively inexpensive. Continued regional and domestic tensions will contribute to the insecurity of states, as will their desire to rely on these weapons for their national security objectives. The use of the black market to obtain quick profits will remain an incentive to sell required technologies to the nonpossessor states. Nevertheless, numerous steps can be taken against the proliferation of WMD, and international law, particularly through treaties, can continue to play a major role in that effort.

Resources

Associated Press. "Report: Syria Tested Long-Range Scud Missiles," August 20, 1996.

Associated Press Worldstream. "Japan Adds Push to Chemical Weapons Treaty With BC-Japan-Subway Poisoning," March 30, 1995.

CIA. "Iran Holding Limited Stock of Biological Weapons," *Defense Week* 17, no. 32, August 5, 1996.

"Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological)

and Toxic Weapons and their Destruction." 26 UST 583, 1972.

"Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and Their Destruction." Senate Treaty Document, no. 21, 103d Congress, First Session, 1993, reprinted in 32 ILM 800, 1993.

"Countries That Own Ballistic Missiles Are the True Threat." *The Washington Times*, August 20, 1996.

START I. "Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Reduction and Limitation of Strategic Offensive Arms." 102d Congress, First Session, 1991.

START II. "Treaty Between the United States of America and the Union of Soviet Socialist Republics to Further the Reduction and Limitation of Strategic Offensive Arms." 103d Congress, First Session, 1993.

"Treaty for the Prohibition of Nuclear Arms in Latin America and the Caribbean." 22 UST 762, 1967.

"Treaty on the Non-Proliferation of Nuclear Weapons." 21 UST 483, 1968.

United Press International. "U.N. Council Meets on Iraq." August 22, 1996. ♦

Teaching Strategy

Hypothetically a Case of Conflicting National Interest

Santo Scarpinito

Update on Law-Related Education, 21.1, 1997, pp. 28–29. © 1997 American Bar Association.

Background

A memorial (a presentation that presents an argument or offers advice to the International Court of Justice) provides a means to rise above emotions to discuss political and legal arguments rationally. Essentially, the process involves an argument and a counterargument delivered through a formatted series of statements intended to establish a position. By writing "mini-memorials," students can gain understanding of the vitally important concepts raised in International Court of Justice cases and in international law. The "mini-memorial" can support the means to provide simple student opinions or, through research, develop an argument with supporting evidence.

Objectives

As a result of this lesson, students will

- Understand many legal international concepts (i.e., national interest)
- Understand the role of the International Court of Justice
- Develop an appreciation of opposing points of view
- Engage in formatted oral argument
- Formulate opinions and draw conclusions

Target Group: Grades 8–12
Time Needed: 4 to 5 class periods
Materials: Student Handout

Procedures

1. Discuss what a memorial is (see also page 13), and introduce the concept of a mini-memorial. On the board or an overhead transparency, outline the mini-memorial format. Discuss the format with students.

MINI-MEMORIAL FORMAT

- **Questions presented**—what questions do you plan to address in this argument?
- **Statement of facts**—describe in detail the event at hand.
- **Argument**—respond to your questions, using sound judgment and/or researched data. Supporting data may include related treaties, customary law, judicial decisions, and general principles of international law.
- **Conclusion**—provide a brief summary statement.

2. Distribute the Student Handout. Have students read and discuss the case.

3. Divide the class into several groups. Ask each group to write a memorial for either an argument or a counterargument. Provide time for students to prepare their memorials.

4. Assign the following roles to students: (a) attorney(s) for argument, (b) attorney(s) for counterargument, (c) student judges.

5. Help students establish courtroom procedures for the presentation of the memorials.

6. Initiate arguments. After the student court reaches its decision, discuss the effectiveness of the memorials and their impact on the decision.

Student Handout

Hypothetical Example

Rapidon v. Old Francha is based on the authentic 1966 case of *New Zealand v. France*, in which the need for France to maintain its emerging national security was pitted against New Zealand's need to maintain a predominantly agrarian society.

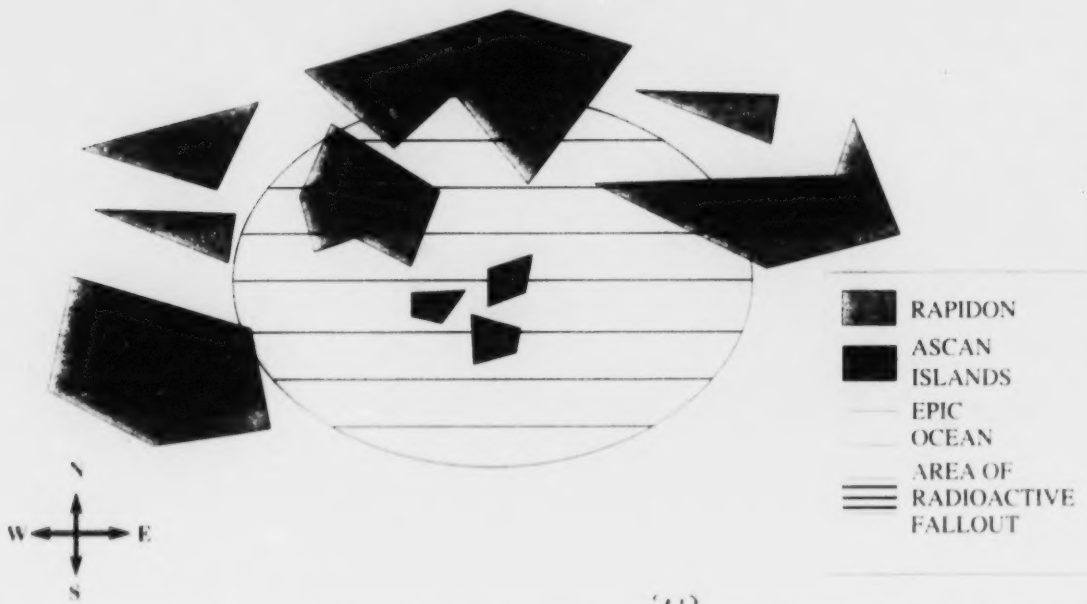
Rapidon v. Old Francha

Beginning in 1966, Old Francha had carried out atmospheric tests of nuclear devices on the Ascan Islands, a possession of Old Francha. The government of Rapidon objected to the tests on the grounds that they caused radioactive fallout on its territory. Rapidon asked the International Court of Justice (ICJ) to declare that carrying out further atmospheric nuclear tests on the Ascan Islands was not consistent with applicable rules of international law.

On June 22, 1973, at the request of Rapidon, the Court granted an interim measure of protection and ordered Old Francha to stop conducting these nuclear tests until the Court could rule on the case. Rapidon submitted evidence that Old Francha had violated this order once, which resulted in fallout on Rapidon's territory.

Old Francha is a member of the United Nations, but its government did not sign the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space, and Under Water of August 5, 1963. Old Francha is a developed, industrial nation and an emerging nuclear power. It is landlocked on three sides and is bordered by three countries. In the past years, serious conflicts arose between Old Francha and its surrounding neighbors; more significantly, these adjoining nations have acquired nuclear capability. If the interim measure by the ICJ is enforced, it would jeopardize the balance of power in the region and threaten Old Francha's national security.

Rapidon is a member of the United Nations, and it did sign the Treaty Banning Nuclear Weapon Tests. Rapidon is primarily an agrarian country; more than 80 percent of its total population live on farms. Its economy is based mostly on the export of agricultural products. Rapidon reported that approximately 10 percent of its crops had been contaminated by radioactive fallout. Rapidon believes that if further nuclear tests are conducted in the region, both its economy and environment will suffer severely.



Humanitarian Consequences of Land Mines

Land mines devastate the civilian populations of war-torn countries.

Ken Rutherford

Update on Law-Related Education, 21.1, 1997, pp. 30–31. © 1997 American Bar Association

The United States Department of State has said that land mines may be the most toxic and widespread form of pollution threatening people today. It estimates that between 85 million and 90 million uncleared land mines are currently deployed in at least 62 countries.

Land mines maim and kill all too frequently—in fact, at least 1,200 people per month are maimed or killed by land mines. It is estimated that more civilians have been injured or killed by land mines than by chemical and nuclear weapons combined. Even though mines are supposed to have a military purpose, four out of five of the victims are civilians—including many women and children. According to UNICEF, land mines are killing and maiming more children than soldiers. One study on Afghanistan during a six-month period in 1992 showed that 85 percent of those injured in mine explosions were engaged in nonmilitary activities such as farming, traveling between villages, or tending cattle.

The Land Mines Protocol is the only international treaty that specifically addresses land mines. It does not give the international community the legal right to govern the production, export, or stockpiling of these weapons. It only purports to regulate their use.

Since the Protocol was adopted in 1980, it has become increasingly clear that it is a failure. More than 65 million land mines have been deployed since the agreement was ratified. Its failure is attributable to the vagueness of its wording, which allows for wide interpretation.

Any international treaty related to land mines that contains less than a total ban will result in a complex set of legalistic rules that any country can interpret in any way it chooses. It is important that the treaty language be clear and concise so that everyone understands its meaning and intent. This is crucial when the law's intended recipients speak no common language. Unfortunately, the linguistic richness characteristic of the global community complicates international legal dialogue.

International law regarding land mines is outlined in the Land Mines Protocol in the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects. The Land Mines Protocol was incorporated into the Convention as Protocol II and is officially called the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps, and Other Devices. The Convention itself is attached to the 1977 Additional Protocols to the 1949 Geneva Convention.

Combined, these restrictions are supposed to prohibit the direct use of land mines against civilians, who are defined as "anyone who is not a member of the armed forces or an organized armed group of a party to the conflict." Indiscriminate use of land mines is also prohibited.

Historical Significance

The increased production and deployment of land mines is a reaction to the evolution of warfare. Historically, military conflict entailed confrontation between nation states for short periods of time. During the Cold War, however, when a major power supported a government or a rebellion with a similar ideology (communist, capitalist, dictatorial, etc.) or, more often, a country that provided a strategic asset such as location or minerals, the more powerful nation would most likely support its allies with arms and money. These conflicts, flamed by outside powers, led to long-term civil wars. Instead of outright conquest, the goal became economic and social destabilization of the opposition. Disrupting the lives of the civilian population became more prevalent in warfare. The resultant effect of this strategy led to some of the highest concentrations of land mines the world has ever seen.

Ken Rutherford is pursuing his Ph.D. in International Relations at Georgetown University in Washington, D.C., where he holds a teaching fellowship. He has co-founded the Land Mine Survivors Network, the first organization formed by survivors of land mine incidents.

In Angola, for example, it is estimated that there are two unexploded land mines (20 million) in the ground for every citizen (population 10 million). Estimates for Afghanistan, considered the most heavily mined country in the world, vary from 10 million to 35 million. Cambodia is another country where land mines have seriously compromised its future. According to the State Department, Cambodia is "a textbook case of a country crippled by uncleared land mines."

Land mines are still being deployed in large numbers, but, ironically, the most rapid increase in their use has shifted from Africa and Asia to the continent that is their main production center—Europe. Recent estimates show that there may be more than 7 million land mines in the former Yugoslavia alone. Some experts contend that, at the height of hostilities, upwards of 50,000 mines were being planted in the ground each week.

Many rural victims of land mines die in the field or in transit. They do not have ready access to medical facilities, let alone the quality of medical care that is available in developed countries. Once they arrive at a rural health center, assuming they are still alive, the victims must suffer through usually rudimentary first aid. Land mine injuries require prompt and repeated surgical care that is not readily available in most of the countries that are plagued with the problem.

According to the United Nations, every 15 minutes of every day of every week of every month of every year, a land mine explodes and kills or horribly maims some unsuspecting person. Delay adds to the parade of land mine victims. The International Committee of the Red Cross estimates the ratio of amputees (all who have lost limbs from any cause, not just land mines) to total population is extremely high for the following countries: Cambodia, 1:236; Angola, 1:470; Somalia, 1:650; Uganda, 1:1,100; Mozambique, 1:1,862; and Vietnam, 1:2,500. Contrast these with the United States, where the ratio is 1:22,000.

Economic Considerations

In most of the 60-plus countries where land mines are prevalent, having one's arms or legs is a key to economic survival. The people are farmers, herders, traders, or merchants who need their hands and feet to work. Loss of a limb can have a devastating economic and social impact on a victim's family. With deaths or injuries of breadwinners, families are commonly left destitute. For female amputees, especially those of marriageable age, social ostracism is almost inevitable. In many countries, they soon become a financial burden. It is estimated that only 20 percent of Cambodian amputees will ever find work.

Many land mines can be produced for $3 apiece and are often no bigger than a cigarette pack. To deactivate such a mine might cost as much as $1,000 or more. This is due to the incredibly demanding work, which is unsafe to begin with and repetitious—causing carelessness. There are no second chances if someone makes a mistake.

A case in point is in Kuwait, where some 7 million land mines were laid down before and during the Persian Gulf War in 1991. Even more intimidating is the fact that, according to the *New York Times*, all five of the Kuwaiti mine-clearance experts were killed during the first week after the war. An additional 83 international mine-removal personnel—also considered to be experts in the field—have perished since the government of that nation offered over $1 billion in contracts to clean up its territory.

Conclusion

It is obvious that the provisions of the Land Mines Protocol are not being adhered to with any seriousness. Only the institution of a complete prohibition on the manufacture and sale of mines will be effective. Even though these mines have proven to be one of the most indiscriminate and cruel weapons ever created, governments—including that of the United States—continue to produce them.

Since World War II, every major arms-control agreement has necessitated leadership by the United States. Without a commitment by the U.S., there will be no complete ban on the production and sale of land mines. Public education, therefore, is essential to build American support for efforts to ban land mines in the international arena. When processing and distributing loans to the Somalis, I made it a point to say that the money came from the people of the United States of America. In the future, I would also like to say that we were instrumental in setting the standard in the fight against land mines. ♦

Suddenly a Victim . . . In December 1993, I was working as a credit union training officer for the International Rescue Committee in Somalia, where my job was to help Somalis apply for loans to rebuild their country. My project was funded by the United States Agency for International Development and the United Nations High Commissioner for Refugees. On December 16, as I was inspecting a program site near the border with Ethiopia, my vehicle hit a land mine. I suddenly became something rare for an American—a land mine victim.

After the explosion, I first remember seeing my foot lying on the floorboard of the car. I remember thinking, "Is it mine?" It was. It was my right foot. I remember that I kept trying to put it back on, but it kept falling off.

I am alive today because of the resources that I had at my disposal: a radio to call for help and aircraft to evacuate me. Most land mine victims are not so lucky. The U.N. estimates that the average lifetime care of land mine victims costs from $5,000 to $7,000. My medical costs have already exceeded $300,000. Thus far, I have had 10 surgeries in seven hospitals in four countries.

Teaching Strategy

Land Mines—After the War!

Gayle Mertz

Update on Law-Related Education, 21.1, 1997, pp. 32–35. © 1997 American Bar Association.

Background

In this lesson, students will have the opportunity to explore the brutal realities of human suffering, the complicated relationships between nations, and the controversies surrounding the effectiveness of the United Nations. It will be difficult to transcend framing these issues as good guy/bad guy situations. Students should be coaxed to undertake an examination of the history and positions of the different actors in this drama. When introducing this strategy, share Ken Rutherford's article (p. 30), which relates an emotional and politically complex series of events involving land mines.

Objectives

As a result of this lesson, students will

- Investigate the variety and scope of problems related to the use of land mines and their impact on civilian populations
- Become engaged in an international problem-solving exercise involving human rights

Target Group: Secondary students
Time Needed: 3 class periods; independent research time optional
Materials Needed: Student Handouts 1 and 2

Procedures

1. Ask students to work in pairs, and distribute a sheet of graph paper to each student. Have students number the lines at the top from 1–20 and write the letters A–T next to the lines on the left side of the paper.

2. Explain that the activity is based on chance and strategy. Ask students to imagine that they live in a war-torn community. They are solely responsible for working to provide food for their entire family. To go to and from their work, they must walk through a field filled with land mines.

3. Ask one student from each pair to mark ten grid intersections with Xs. The grid represents the field that a worker must cross. The student must not show his or her partner the intersections that he or she has marked. Each mark represents a land mine.

4. The second student must try to safely navigate from his or her home at the east edge of the grid through the field to get to work at the west edge of the grid. He or she cannot walk around the field. It is surrounded by steep mountains on the north and a swift river on the south. The student cannot jump over intersections and must move from one intersection to the next closest intersection in any direction. As the student crosses each intersection of a number and a letter, the student tells his or her partner where he or she is. The object is to cross the field without hitting a land mine. The first student will tell the second student if and when he or she steps on a land mine. Assuming any student stepping on a mine is only injured, direct all students to continue walking to their work site.

5. Ask students to reverse roles and repeat the activity.

6. Survey the class to see how many students arrived at work safely without injury. Discuss how students felt during the activity—could they or did they use a strategy to cross the field, or did they simply walk through the grid.

7. Explain to students that their class is going to work on an international problem-solving activity. They will learn about how the international community attempts to prevent and resolve civilian injury and death during military hostilities, and they will learn more about land mines.

8. Distribute Student Handout 1 to groups of three students. Each student reads one section and reports on its contents. (Students can conduct independent research to supplement the information in the handout.)

9. Distribute Student Handout 2 and assign each group of students a country to represent, using the list of countries that manufacture land mines.

10. Ask each country/group to create a proposal to address issues related to land mines on an international level. Ask students to base their proposals on the reading and research they have completed, their own opinions, and their problem-solving skills.

11. Once each group has developed a proposal, a delegate from each group should visit the other groups to discuss proposals. Delegates should attempt to negotiate and reach a consensus. As any two groups reach even a partial agreement, they should approach an additional group to include in their discussion.

12. Facilitate a full-class discussion. Question students about what they have learned about land mines. How serious do they think the problem is? Did they come up with creative solutions to some of the problems related to land mines? Do they think the international community would endorse their proposals?

Student Handout 1

What Is a Land Mine? How Is It Used?

There are two main types of land mines: anti-tank mines (AT) and anti-personnel mines (AP). Anti-tank mines are large (usually larger than a person's shoe), and they are heavy. They contain enough explosives to destroy a vehicle as it runs over them. Frequently the people in the vehicle are killed. These mines are laid on roads, bridges, and tracks where enemy vehicles are expected to travel.

Anti-personnel mines are much smaller and less powerful. They come in all shapes and sizes. They can be as small as a cassette tape. They are designed not to kill, but to wound people. By only wounding people, the anti-personnel mines require the enemy to take time and resources to aid their wounded.

Anti-personnel mines can be set off in a number of ways—by putting pressure on the mine by stepping on it, pulling on a wire, shaking it, removing a object that is on top of it, or removing a part of the mine, or by remote control.

Mines are sometimes laid by hand and sometimes *seeded* by dropping them from an airplane. Anti-personnel mines are often laid around a village, along a road, on bridges, near single trees, or along a riverbank. Sometimes they are just scattered randomly. The position of lightweight mines can change when ground saturated by rain moves or sand moves or shifts.

- Today more than 110 million* active mines are scattered in 68 countries, and an equal number are stockpiled.
- Currently, every month over 2,000 people are killed or maimed by mine explosions. Most of the casualties are civilians who are killed after hostilities have ended.
- For every mine cleared, 20 are laid. In 1994, approximately 100,000 were removed, and 2 million were planted.
- Land mine victims need blood transfusions twice as often as those injured with bullets, and they usually need two to six times as much blood.
- Surgical care and the fitting of an orthopedic appliance cost about $3,000 per amputee in a developing country.
- Buried land mines can remain active for over 50 years.

As more and more nations manufacture mines, more varieties are invented and prices become lower and lower. According to quotes from weapons producers, mines are sold for between $3 and $15 per unit. Surplus stock is often sold far below cost. Models in the lower price range include Chinese models at $3–$4, the Brazilian APNM AE TI at $5.80, and the Belgian NR 25 that sells for $6.70 in lots of at least 5,000. It costs between $300 and $1,000 to neutralize or disarm one land mine.

* Because of the difficulty of gathering information about land mines, figures may vary depending on the source cited. The source of statistics for Student Handouts 1–2 is Mine Clearance and Policy Unit; DHA (Department of Humanitarian Affairs) S-3600, United Nations, NY 10017.

Land Mines and International Law

The CCW (*Convention on Prohibition or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects*) is the only international treaty that applies to land mines. The law applies only to nations that have ratified it. Since the international treaty was passed in 1980, only 49 countries have ratified it. Sixteen other countries have signed the treaty, but they have not yet ratified the Convention.

The treaty states

1. Mines may be used only against military targets.
2. Remotely delivered mines may not be used unless their location is accurately recorded, or they have neutralizing mechanisms built into them.
3. Records must be kept of preplanned mine fields.
4. After hostilities, mine fields will be cleared.

The treaty is weak because

1. It applies only to international conflict.
2. There is no provision for verifying compliance.

Continued on page 34

Continued from page 33

In 1995 and 1996, a Review Committee met to consider revision of the treaty. It considered

1. Requiring that mines be detectable
2. Prohibiting remotely delivered mines that are not self-destructing
3. Prohibiting booby traps
4. Establishing a way to verify compliance
5. Setting up a method for international cooperation in mine clearance

To date, no action has been taken on any of these recommendations.

The Role of the United Nations

On October 24, 1945, following World War II, the United Nations was founded. The U.N. Charter states

WE THE PEOPLES OF THE UNITED NATIONS DETERMINED

- to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and
- to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and the nations large and small, and
- to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and
- to promote social progress and better standards of life in larger freedom,

AND FOR THESE ENDS

- to practice tolerance and live together in peace with one another as good neighbors, and
- to unite our strength to maintain international peace and security, and
- to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and
- to employ international machinery for the promotion of the economic and social advancement of all peoples,

HAVE RESOLVED TO COMBINE OUR EFFORTS TO ACCOMPLISH THESE AIMS. ...

Chapter 1
PURPOSES AND PRINCIPLES

Article 1
The purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

4. To be a center for harmonizing the actions of nations in the attainment of these common ends.

Article 2
The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

1. The Organization is based on the principle of the sovereign equality of all its Members.

Student Handout 2

What Nations Are Involved With Land Mines?

Land mines are currently scattered in 68 different nations. Some examples of the scope of the problem include

Afghanistan
There are an estimated 10 million mines strewn throughout Afghanistan. Most were scattered randomly, and no record was made of their location. The United Nations Office for Humanitarian Assistance Coordination is working to clear the mines. The office has nearly 3,000 workers. By the end of 1994, they had cleared almost 110,000 mines.

Cambodia
Cambodia has the world's highest proportion of mine amputees and continues to claim more than 300 new victims every month. There are an estimated six to ten million land mines still lurking beneath Cambodia's soil.

More than 50 different countries are thought to produce between 500,000 and 1 million mines per year. Thirty-five of these countries are known to export the mines. Today about 100 different companies worldwide produce several hundred types of mines. The exact numbers cannot be determined because manufacturers do not make production figures public.

Recent studies by Africa Watch and the United States Congressional Research Service listed Belgium, China, the former Czechoslovakia, Germany, Italy, South Africa, the United States, the former Soviet Union, Bulgaria, China, the former East Germany, Hungary, Vietnam, and the former Yugoslavia as countries where mines are being manufactured and sold.

Global Land-Mine Crisis
Countries and Other Areas With Uncleared Land Mines

Central and South America
Colombia
Costa Rica
Ecuador
El Salvador
Falkland Islands
Guatemala
Honduras
Nicaragua
Peru

Europe and Asia
Austria
Azerbaijan
Belarus
Belgium
Bosnia & Herzegovina
Cambodia
China
Croatia
Cyprus
Czech Republic
Denmark
Germany
Georgia
Jammu & Kashmir
Korea
Laos
Latvia
Luxembourg
Burma
Netherlands
Philippines
Russian Federation
Slovenia
Sri Lanka
Syrian Arab Republic
Tajikistan
Thailand
Turkey
Ukraine
Vietnam
Yugoslavia

Africa & Middle East
Afghanistan
Angola
Burundi
Chad
Djibouti
Egypt
Ethiopia
Eritrea
Iraq
Islamic Republic of Iran
Jordan
Kuwait
Liberia
Libya
Mauritania
Mozambique
Namibia
Oman
Rwanda
Senegal
Somalia
Sudan
Tunisia
Uganda
Western Sahara
Yemen
Zaire
Zimbabwe

Source: United Nations, Department of Humanitarian Affairs

The Environment: The Tie That Binds

There are many reasons to be concerned about pollution, and one of them is you.

Elissa C. Lichtenstein

Update on Law-Related Education, 21.1, 1997, pp. 36–39. © 1997 American Bar Association.

A Small World

Environmental problems can have more significance than one might expect—to the beauty of our planet, to the health and well-being of its plant and animal life, and to the laws that bind its nations, among other areas of concern. This is because the environment links everything on Earth. When forests are destroyed, ecosystems may perish with them. When rivers are poisoned, cities may die. Forests and cities are tied to regions that are part of nations that circle the globe. Since the nations of the world share one environment and the natural resources within it, one can see how international political relations and the balance of power might be affected, most obviously for nations that share borders, but not only for them.

For example, pollution of any sort is not the problem of any single municipality, region, or nation, but rather of all. Winds over the Sahara have at times altered the weather in the Caribbean, across the Atlantic Ocean. The release of radiation from a disabled nuclear power plant near Kiev in the Ukraine, which lies in Eastern Europe, was detected in Sweden, in faraway Scandinavia. Uncontrolled disposal of chlorofluorocarbons (CFCs) anyplace on the planet may deplete the ozone layer above us and harm everyone in the world. With its high standard of living, the United States is the world's largest generator and consumer, and its largest producer of waste. This is why America, in particular, plays a critical role in protecting the environment so as to ensure global survival.

Environmental problems are more easily recognizable than their solutions. The President's Council on Sustainable Development (*Sustainable America* 5) reports that, since the end of World War II, economic output has increased substantially, allowing widespread improvements in health, education, and opportunity, but also widening the gap between rich and poor, even in the United States. The world's population has doubled in the last 50 years, and people demand more food, goods, services, and space. Where there is conflict, rising demand for land and resources worsens the problem. Struggling to survive in places that are no longer able to sustain them, people deplete the resources around them, sometimes affecting the entire planet.

Putting Awareness on Paper

While the exhaustion of nonrenewable resources, like gas and oil, may result in economic changes and population dislocations, the destruction of otherwise renewable resources has much broader ramifications. For example, when unlimited logging destroys a forest or erosion alters coastal areas, native species might disappear altogether. According to the President's Council, between 1850 and 1980, 15 percent of the world's forest was lost. By 1990, another 6 percent—an area larger than California, Texas, New York, and Montana combined—fell to the ax, along with countless plants and animals. In one recent, heartening development, lawyer Antonio Oposa has relied successfully on Section 16, Article 2 of the Philippines Constitution, "... the State will protect the right of the people to a healthful and balanced ecology in accord with the rhythm and harmony of nature" to help pioneer protection of valuable Philippines forestland (Oposa 1993).

The past several decades have seen a much improved awareness of the resources that sustain our planet, and of what we must do to protect them. Here are just a few examples of recent international agreements to protect resources and the environment (see Susskind Appendix A, unless otherwise noted).

- In 1959, the nations claiming parts of the Antarctic voluntarily agreed to undertake scientific research without dumping waste, causing waste by bringing in sled dogs or poultry, or killing seals for commercial profit. Concern over the protection of the

Elissa C. Lichtenstein is Director of the American Bar Association's Division for Public Services and its Standing Committee on Environmental Law in Washington, D.C.

Worldwide Environmental Concerns

The effects of industrialization, aggravated by a swelling of human population, are disturbing the web of elements on which all life depends. Consider the following, as reported by the American Bar Association (1–3).

- *Fresh water* The quality of fresh water around the world is a critical concern—pollution of rivers and lakes is rampant. Erosion of water quality affects every aspect of life, including fishing, tourism, and related industries. Sources of potable and even agricultural-grade water are suffering from the effects of overuse and pollution. In some nations, the water is unfit even for industrial use.
- *Arable land* Rich topsoil on farmlands is being displaced by barren soil as it is overgrazed, underirrigated, and washed away.
- *Forests* Trees are being stripped and burned for many reasons—to make way for construction; to provide wood for commercial use; and, in much of the Third World, for fuel. Deforestation presents a double threat, not only to the widely varied and numerous plants and animals in a given forest, but also to carbon dioxide absorption and oxygen generation, which are necessary to sustain all life.
- *Oceans* Modern technology has made it possible for fishing trawlers to sweep distant seas with huge driftnets 30 miles long, snaring everything in their path. At the same time, coastal wetlands—a breeding ground for marine life replenishment—are infested by commercial development, oil spills, and sewage disposal. The deeper reaches of the ocean floor are being affected by coastal runoff and wastes dumped into the sea.
- *Biodiversity* On land, many plant and animal species are dying. This is partly deliberate, as in the overhunting of elephants and other game; yet, more commonly, it is the unintended result of construction or clearing activities related to economic development. While the Amazon rainforests are the best-known example of this depletion, threats are also prevalent in Africa, Asia, and even the United States. Besides the obvious loss of plant and animal life, we could also be losing potentially highly valuable sources of medicines and other products that may help humanity survive and prosper in good health. Another disturbing factor is the introduction of new species that, unchecked by native predators, destabilize the local environment.
- *Air pollution* In the stratosphere, the layer of ozone that shields life from the sun's potentially most lethal ultraviolet radiation is under assault. There is evidence that, when released into the air, CFCs, halons, and other gaseous elements used in refrigerators, air conditioners, and fire extinguishers create chemical reactions with the upper ozone layer that deplete this protective covering. Increased radiation increases the incidence of skin cancer. Because of this concern, CFC production is being phased out.

Below the stratosphere, each year hundreds of thousands of tons of carbon monoxide, sulfur dioxide, hydrocarbons, and particulate matter (mainly dust) are discharged into the troposphere (the atmospheric layer nearest the Earth's surface). There, they engage in chemical reactions that may depress crop yields, imperil human health, and corrode anything from priceless granite statues to automobiles. Winds can carry this pollution not only across state lines, but across oceans.

Antarctic has resulted in a number of other treaties, and there is currently a 50-year ban on mineral exploration and exploitation there.

- In 1972, the Stockholm Declaration on Human Environment directly addressed cross-border pollution and went on to state a responsibility of nations "to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." Combining sovereignty and responsibility, Principle 21 of the declaration has led to today's foundation of "sustainable development." A decade later, the World Charter of Nature further emphasized these concepts (Sohn 2–3).
- In 1973, a 96-member Convention on International Trade in Endangered Species (CITES) agreed to ban trading in a specified list of plants and animals thought to be in danger of extinction. This important agreement led to an 80-percent decline in elephant poaching after a prohibition on ivory trading was put into effect.
- By 1975, 66 countries signed a treaty that bans the dumping of low-level radioactive wastes in the ocean. The Convention on the Control of Transboundary Movements of Hazardous Waste was later signed in 1989 and went into force in 1992. It required nations shipping wastes to obtain prior written consent from the nations receiving them. While a number of the latter objected for trade and income reasons, some have now agreed to refuse such shipments.
- A number of treaties deal with primary issues such as air and water pollution. Among them, the Geneva Convention on Long Range Transboundary Air Pollution, ambitiously developed to control acid rain, eventually led to the Protocols signed in Helsinki, Sofia, and Geneva addressing specific kinds of pollutants that contribute to it. In 1987, the Protocol on Substances That Deplete the Ozone Layer (the Montreal Protocol) called for the elim-

NIMBY

Not in my backyard (NIMBY) is a universal no to the disposal of hazardous wastes, which has become a boom industry (Rummel-Bulska foreword). Estimates of internationally generated hazardous wastes—corrosive acids, organic chemicals, toxic wastes, and others—range from 300 to 400 million tons per year; something must be done to dispose of them. Shipments from more to less developed nations represent about 10 percent of the total transboundary, waste-related freight. Underdeveloped countries do not have the technical capacity to dispose of the portion being sent to them, giving rise to the terms *toxic terrorism* and *garbage imperialism*, which are used by the press to describe the practices of the developed nations that dump their waste in this manner (6).

ination of certain compounds emitted into the air.

- The United Nations Conference on Environment and Development (UNCED), held in Rio de Janeiro in 1992, was a watershed global conference that brought together the heads of 110 nations. They acknowledged a common future that called out for joint action, with most or all signing several important agreements on climate change, biodiversity, forestry, and the Rio Declaration (listing sustainable development principles). They also created "Agenda 21," an ambitious blueprint for action on sustainable development affecting virtually every sector of society.

Application of agreements can be limited for many reasons, including loopholes, issues of national sovereignty, lack of enforcement, political problems, or insufficient funding. In the case of UNCED, governments have subordinated long-term damages to shorter-term economic development. There has been a need to address unrest in various parts of the world. And, in some cases, financing has been lacking to carry out its goals (Shabecoff 7–8). UNCED agreements have met protests ranging from objections about timetables to disagreements over the capabilities of developed versus developing nations to meet the terms of the agreements.

Yet efforts are underway to bring UNCED's Agenda 21 to life. The U.N. Commission on Sustainable Development will track nations' progress in implementing Agenda 21. The U.S. President's Council issued a comprehensive national action strategy in early 1996 and has been asked by President Clinton to take steps to achieve their ambitious vision.

Economics, Politics, and Trade

Economics—money, profits, making a living wage—oftentimes takes precedence over the environment. If people cannot afford to eat, what does it matter to them whether the water is dirty or the air is filled with smog? If someone can afford to live well in a suburb, what does it matter that the inner city is strewn with garbage? Money—not air or water—it is said, makes the world go 'round.

In their quest for modernization, emerging countries face the challenge of juggling insufficient budgets, perhaps weak economies, and burgeoning populations. At the same time, fledgling democracies more often than not must pay interest on mountains of international debt that was accrued primarily to boost their economies and maintain their political stability. In this context, many developing nations, already resentful at the imbalance in the wealth of nations, take offense at the notion of their supposed disregard for the environment. Economics or politics dictates their priorities—money spent on a jobs program is more likely to please a struggling population than is the allocation of government funds to an environmental cleanup effort.

In international affairs, trade and environmental policies are vital instruments. Schorr asserts that, just as intellectual property laws (copyrights and patents) ensure that the benefits of invention are returned to the product's creator, so effective environmental laws should ensure that cleanup costs are borne by the producer—not "externalized" to society as if the environment was a free material to be costed out on a cross-border basis (118). Some of the more contentious issues that arise under the North American Free Trade Agreement (NAFTA), which involves the United States, Mexico, and Canada, are about environmental matters. For example, there are conditions that require each nation to have good environmental laws in place. Yet, as Schorr and others point out, the basic clauses of NAFTA and the General Agreement on Trade and Tariffs (a worldwide trade treaty intended to encourage free trade, which predates the current World Trade Organization) are in tension—if not in outright conflict—with trade provisions in international environmental agreements. Trade agreements are designed to protect and promote the interests of the countries entering into them. They also may treat domestic environmental regulations as potential "nontariff barriers" to trade, opening an international avenue of possible litigation against environmental regulations. By requiring environmental rules to be "least restrictive to trade," trade rules may elevate trade to the status of an end in itself, while ignoring the value judgments and political realities inherent in the environmental rule-making process.

Road to a Sustainable Future

No one body controls international environmental law or policy. Within the U.N. system alone, numerous agencies address environmental matters. In its complexity, the international environmental boat may sink or float. Each nation must take responsibility for ensuring that its activities do

not cause environmental damage to other nations, especially because the existence of international agreements is not a solution in itself (though they are important as reflections of the signing nations' willingness to make needed changes).

The World Charter for Nature proclaims that it is imperative to have a collaborative cross-border action to safeguard the planet's life-sustaining climate, coupled with an international strategy that transcends state sovereignty in the interest of present and future generations.

On an individual level, we all need to look at not only what we are doing to ourselves, but what we are doing to the world's children, thus committing ourselves to an intergenerational goal. International environmental law developments will be affected by all of us in our separate but linked countries—by government stability; public education, awareness, and involvement; improved understanding of other cultures; intelligent cross-boundary sharing of resources, done in good faith; creative financing (especially with respect to developing countries); and cooperation and consensus within the private sector, and between private and public sectors. Much progress has been made in this direction, but we have a long road to travel—and we must travel it together.

This effort must be sustainable, which is to say that governments, indigenous peoples, businesses, conservationists, academics, and other "stake holders" must work to make that vision a reality. In real terms, it means acting on the basis of consensus among the sectors instead of solely through government regulation and penalties, and enhancing public participation and ensuring environmental justice for all populations.

What does sustainable development have to do with our everyday lives? Everything. We must "think globally," yet "act locally," by taking action to preserve the riches of our environment and minimize its degradation for the benefit of coming generations.

Our environment's future rests with us, including the air we breathe, the water we drink, the forests and fields that yield us basic products and sustain plants and animals. It will affect our neighborhoods, our cities and states, our nations, and our planet. Our willingness to cooperate locally, nationally, and globally—both within and in addition to our lawful obligations—will determine whether we leave behind the bountiful natural resources that we have enjoyed and that have helped us prosper and live satisfying lives. The complexity of protecting so much, with so much at stake, helps drive efforts at international cooperation on the environment. If nations work together to succeed, all of us will win.

Resources

International environmental law is a rich and complex subject. This article has touched on some highlights, but space limitations do not allow all key issues and actors to be discussed. These resources will be helpful additions to any discussion about international law and the environment.

Agenda 21: Earth's Action Plan. Nicholas A. Robinson, ed. Oceana Publications, 1993.

American Bar Association Policy #10B, sponsored by the ABA Sections of Business Law, International Law & Practice, Tort & Insurance Practice, and the Kansas City Metropolitan Bar Association, August 1991.

Caldwell, Lynton Keith. *International Environmental Policy: Emergence and Dimensions*. Duke Press Policy Studies, 1990.

Environmental Law. Newsletter of the Standing Committee on Environmental Law, American Bar Association. E. Lichtenstein, A. Dunn, eds., vol. 11, No. 4 (1992).

Oposa, Jr., Antonio, in *Environmental Regulation in Pacific Rim Nations*. American Bar Association Standing Committee on Environmental Law. E. Lichtenstein and R. Abate, eds., 1993.

Rummel-Bulska, Iwona. "The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal." UNEP Environmental Law Library No. 2, 1990.

Sands, Philippe. *Principles of International Environmental Law: Frameworks, Standards, and Implementation*, v. 1. St. Martin's Press, 1995.

Schorr, David K. "NAFTA and the Environment—A Status Report." *Environment and Sustainable Development—Making It Happen*. Alexandria, Virginia: Greenwire, 1995.

Shabecoff, Philip. "Three Years After Rio—An Outlook on Sustainable Development." *Environment and Sustainable Development—Making It Happen*. Alexandria, Virginia: Greenwire, 1995.

Sohn, Louis B. "From the Hills of Tennessee to the Forests of Brazil: A Short History of International Environmental Law." A publication of the American Bar Association, Section of International Law and Practice, in cooperation with the Section on Business Law, Section of Natural Resources, Energy and Environmental Law, and the Division for Professional Education, 1991.

Susskind, Lawrence E. *Environmental Diplomacy: Negotiating More Effective Global Agreements*. Oxford University Press, 1994.

Sustainable America: A New Consensus for Prosperity, Opportunity, and a Healthy Environment for the Future. The President's Council on Sustainable Development, February, 1996.

♦

Teaching Strategy

Global Warming on the International Agenda

Patricia Keenan-Byrne and Mark Malkasian

Adapted from Global Environmental Problems: Implications for U.S. Policy. *Choices for the 21st Century Education Project.* © *April 1992. Revised March 1996.*

Background

Global warming presents several challenges that bridge science, economics, and politics. This two-day lesson introduces students to the problem of global warming and challenges them to grapple with conflicting values as they consider global warming within the context of international politics and economic development.

Objectives

As a result of this lesson, students will

- Learn environmental causes and predicted results of global warming
- Recognize links between industrialization and global warming
- Examine global warming and questions of economic development from multiple perspectives
- Analyze conflicting values and priorities that shape debate over international agreements on global warming
- Articulate informed recommendations for international environmental and economic policies

Target Group: Secondary students
Time Needed: 2 days
Materials needed: Student Handouts 1 and 2

Patricia Keenan-Byrne and Mark Malkasian are based at the Choices for the 21st Century Education Project of the Watson Institute for International Studies, Brown University, Providence, Rhode Island. The Choices project publishes high school curricula on many international topics and offers workshops for teachers.

Procedures

Day One

1. Before Day One, distribute copies of Student Handout 1 and have students read Part 1 "Global Warming and Life on Earth" for homework. Begin class on Day One by reviewing with students the major causes and likely results of global warming.

2. Explain to students that they will assume the roles of delegates attending an international conference on the environment. Divide the class into four groups. Have students read Part 2 "Environmental Politics and Economic Development." Assign the groups to represent one of the following: developed nations, former Soviet bloc countries, newly industrialized countries, or underdeveloped countries. Instruct the groups to read the section of the handout about their assigned role and to plan a brief presentation that explains their countries' concerns about global warming and the environment and their political and economic interests. What are their primary goals? What kind of actions are they prepared to take? What actions do they want other nations to take? What convincing reasons can they offer in support of their position?

3. When the groups have prepared, convene the class as an international conference on the environment. Have groups make their presentations, responding to questions from other groups. Encourage the groups to stay in role and to be persuasive.

Day Two

4. Tell students that they will remain in the same roles assigned to them on Day One. Divide the class into several small groups that contain one representative from a developed country, a former Soviet bloc nation, a newly industrializing country, and an underdeveloped country. Assign each group one of the case studies on Student Handout 2. (It is best if each case study can be given to at least two groups.) Using the questions as guidelines, each group should prepare a brief presentation of their case with specific policy recommendations. Remind students they must balance the interests and concerns of their countries with international concerns about global warming.

5. Groups should present their case studies and policy recommendations. They should be able to defend their recommendations and answer questions from other groups. Compare the solutions and recommendations offered by different groups analyzing the same case. Within the groups, what were the obstacles to reaching solutions? How were these overcome?

6. Have students discuss the insights they have gained. As individuals, what changes in energy-consuming behavior are they prepared to make in order to combat global warming?

Extra Challenge

Have students write to the White House or Congress expressing their view on global warming and making recommendations for U.S. policy in the international arena.

Student Handout 1

Part 1

Global Warming and Life on Earth

Greenhouse Gases

Human activity is altering the earth's climate. In 1995, a United Nations scientific panel of 2,500 scientists from around the world reported that the increase of average global surface temperatures by about 1 degree Fahrenheit in the last century was most likely due to industrialization. Still warmer weather was forecast for the twenty-first century.

Scientists have linked global warming to the buildup of carbon dioxide, methane, nitrous oxide, chlorofluorocarbons (CFCs), and other gases. These gases are often referred to as "greenhouse" gases because they trap heat in the earth's atmosphere in much the same way that a greenhouse prevents heat from escaping.

Carbon dioxide accounts for 60 percent of the greenhouse gas buildup caused by humans. Carbon dioxide sustains plant life and absorbs much of the earth's infrared (long-wave) energy, keeping the earth warm enough to support life. By burning fossil fuels such as oil, coal, and natural gas, humans have added carbon dioxide to the atmosphere. Since the start of the Industrial Revolution in the late 1700s, the amount of carbon dioxide in the atmosphere has increased by 25 percent.

The U.N.'s scientific panel predicts that unless greenhouse gas emissions are curbed, average global temperatures will rise between 1.8 degrees and 6.3 degrees Fahrenheit by 2100. Such an increase could lead to more heat waves, floods, droughts, and fires. Scientists warn that global warming would make desert climates more extreme and wipe out vast portions of forests. The level of the world's seas would rise by about 20 inches as the polar icecaps melt. Nearly 20 percent of the world's human population, as well as many of the planet's most fragile ecosystems, would be vulnerable to coastal flooding.

Deforestation and Desertification

While the burning of fossil fuels in industrialized countries is the primary cause of global warming, other trends contribute to the problem. Since ancient times, people have cleared trees for agriculture and settlements. However, the conversion of wilderness to farmland and pasture destroys plant life that absorbs carbon dioxide from the atmosphere. Today in areas where rainfall is scarce (one-third of the earth's land), clearing of forests often leads to the spread of desert. In Africa, 26 percent of the continent is undergoing some form of desertification.

Tropical forests also suffer. In Brazil, which contains 26 percent of the world's tropical forest, trees have been cleared in the Amazon River basin for cattle ranching, logging, and agriculture. Such deforestation can lead to the extinction of unique species of plant and animal life. Every year, more than 40 million acres of tropical rain forest are lost, along with 4,000 to 6,000 tropical species. Since tropical forests absorb so much of the atmosphere's carbon dioxide and also release large amounts of carbon dioxide when burned, their loss could contribute to global warming.

Part 2

Environmental Politics and Economic Development

Nations of the world agree that global warming is undesirable. Nevertheless, international efforts to prevent global warming have revealed important differences between the wealthier developed countries and the poorer nations. The dispute is not about the importance of the earth's ecology, but about questions of responsibility and priority.

The developed world includes the most industrialized and economically advanced nations such as the United States, Japan, and the nations of Western Europe. Industrialization over the past two centuries has raised living standards in these countries to levels previously unknown in human history. Developed nations produce over half of the world's wealth, consume most of the world's resources, and are primarily responsible for the pollutants that contribute to global warming. Industrialization brought with it environmental problems such as smog, soot, and water pollution, which often result in severe health problems. In recent decades, the developed world has used new technologies and government regulations to

Continued on page 42

Continued from page 41

limit industrial pollution and auto emissions and to encourage conservation of energy. Developed nations do not want less developed countries to repeat environmentally damaging mistakes. Developed nations have been responsible for placing environmental problems on the international agenda.

The former Soviet bloc includes the countries of the former Soviet Union and Eastern Europe. This region underwent a crash program of industrial development under communism but never achieved the wealth of the developed world. Today, many of these countries suffer from the worst consequences of industrialization, but they lack the means to clean up serious environmental problems. There is still a heavy reliance upon poor quality, high-polluting coal and energy-inefficient technologies. In Russia, for example, factories use twice as much energy as their American counterparts, and approximately 25 percent of natural gas production is lost to leakage and inefficiency. Meanwhile, there is little money to upgrade equipment. Nuclear power facilities also pose a serious threat in much of the former Soviet bloc. The explosion within a nuclear reactor at Chernobyl in Ukraine in 1986 heightened fears about more than a dozen similarly designed facilities. The Chernobyl disaster resulted in increased awareness of environmental problems. However, since the collapse of the Soviet Union, economic and political problems in the region have overshadowed environmental concerns.

Newly industrialized countries in Asia and Latin America have embarked on economic programs emphasizing rapid industrial development. Success stories for this approach include South Korea and Taiwan. Other countries, including China, India, Mexico, and Brazil, are pursuing similar courses primarily using fossil fuels for energy. They are anxious to catch up with the developed world economically. Cities like Calcutta, India, and Jakarta, Indonesia, suffer from thick smog caused primarily by the burning of poor-quality coal and organic matter. The use of private cars has shot up in many developing nations, but few of these countries have fuel-efficiency standards and air-quality regulations. Additionally, the modernization and expansion of agriculture in these newly industrializing countries contribute to growing emissions of the greenhouse gas methane into the atmosphere. Leaders of newly industrializing countries argue that they need to keep their farms and factories moving ahead to improve the lives of their people and to lift them out of poverty. They want wealthier countries to provide financial assistance to help install new technologies to reduce greenhouse gas emissions.

The underdeveloped world includes the poorest countries of the world, located mostly in Africa and South Asia. In these countries, environmental problems are caused less by industrialization than by the growing population relying on the land for food and fuel. Deforestation, desertification, and decline of biodiversity are widespread. The famine that struck Somalia in 1992, prompting U.S. troops to intervene to protect international relief efforts, was brought on in part by desertification. Bangladesh, the Maldives islands, and other low-lying countries are particularly concerned that a rise in sea levels brought on by global warming may flood their lands. Many underdeveloped nations also fear losing control of their natural resources to multinational corporations or wealthier countries. They want to be sure to receive a share of the profits from new products derived from resources within their borders. Underdeveloped countries argue that the need for economic development in poor countries cannot be overlooked in efforts to clean up the global environment and that the wealthy countries should absorb the bulk of the costs in helping poor nations meet international environmental standards.

For more information about the Choices for the 21st Century Education Project, visit Choices on the World Wide Web: http://www.brown.edu/Research/Choices/—or call (401) 863-3155.

Student Handout 2

Case #1: Can International Agreements Work?

In 1992, the UN Conference on Environment and Development (Earth Summit) took place in Rio de Janeiro, Brazil. This was the largest gathering of national leaders in history. This conference produced Agenda 21, an ambitious 800-page set of guidelines on the environment and economic development. Some important issues, however, were avoided because of the conflicting interests of participating nations. Developed nations kept out new regulations that would affect multinational corporations, while population growth was hardly mentioned because of pressure from developing countries. (The Commission on Sustainable Development was created to hold governments accountable for implementing Agenda 21, but the commission has no enforcement power other than international pressure.) This pattern repeated itself with two legally binding treaties produced at the Earth Summit: the Framework Convention on Climate Change and the Convention on Biological Diversity. Developed countries wanted a strong treaty to curb deforestation by banning logging in tropical forests. Many developing countries did not want to sacrifice their economic growth and campaigned against regulation of tropical wood industries. They proposed instead to restrict logging in the developed world. Unable to agree, participants merely endorsed a vague statement of preserving the world's forests.

Questions

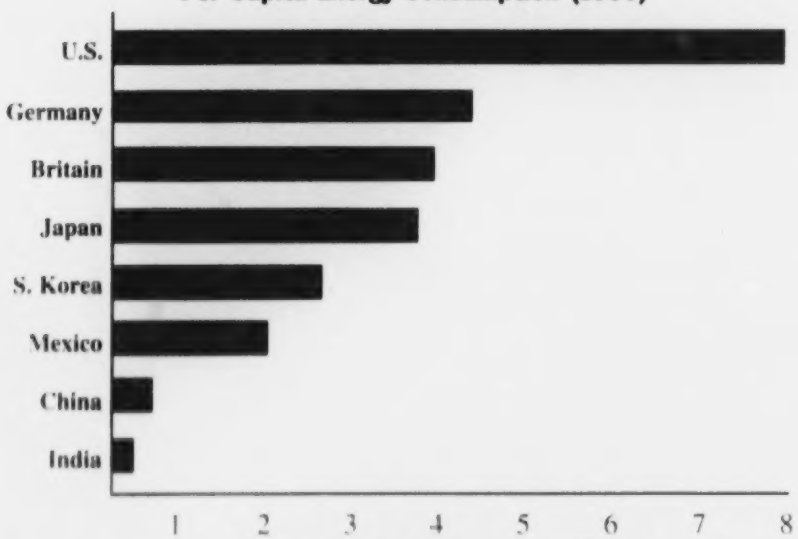
1. How might the agreements outlined be changed to have a greater impact on global warming and deforestation?
2. Should the enforcement powers of the Commission on Sustainable Development be expanded? If so, how? If not, why not?
3. Traditionally, governments have strongly defended their rights to sovereignty—freedom from external control. Under what circumstances should regulations on industry or the environment within a sovereign nation be imposed by outside forces?

Case #2: China Taking the Lead

Home to approximately 1.2 billion of the earth's more than 5.7 billion people, China is the most populous nation on earth. With its rapidly growing economy, China is charting a course for other poor nations aspiring to a better future in the twenty-first century through industrialization. In the last 15 years, China's economy has grown faster than any major country in modern times. If the present trends continue, China will overtake the United States as the world's leading economic producer by 2020.

As a result of industrialization, China has become the world's largest producer and consumer of coal. Coal's relatively low cost and abundance has made it attractive for China and other poor countries on the road to industrialization. However, they are paying a heavy price in the form

Per Capita Energy Consumption (1993)



Energy use calculated in tons of oil
Data from *The Economist*

Continued on page 44

Continued from page 43

of polluted skies and harmful emissions. Within 25 years, China is expected to overtake the United States and the former Soviet Union as the leading emitter of greenhouse gases. Scientists in the developed world fear reckless industrialization will make the earth unable to support the increased level of consumption.

Questions

1. Why is the expanding use of coal in China and other developing countries an international concern?

2. What steps can be taken to reduce greenhouse gas emissions worldwide in the coming decades? How can the costs be fairly managed?

3. Traditionally, governments have strongly defended their rights to sovereignty—freedom from external control. Should outsiders be able to dictate the behavior of industries within a sovereign nation? If so, how? If not, why not?

Case #3: Finding Alternatives to Fossil Fuels

The burning of fossil fuels to power industry and transportation worldwide is primarily responsible for the buildup of greenhouse gases that cause global warming. Emissions of greenhouse gases, however, could be reduced through the use of renewable energy resources that do not emit these gases. Nuclear power and hydroelectric power are the most well-established renewable energy technologies. They supply approximately 35 percent of the world's electricity. However, in recent decades, nuclear accidents have raised concerns about the dangers of nuclear power, and opponents of hydroelectric power protest that the dams needed for hydroelectricity choke off rivers and disrupt fragile ecosystems downstream.

Newer renewable energy technologies harness the power of the wind, sun, and fusion of atoms. Today, they supply less than 1 percent of the world's electricity. These technologies are safe and environmentally friendly, but they will be expensive to refine and implement widely. In California, wind power is still twice as expensive as natural gas for the local utilities. The conversion of sunlight to electricity through photovoltaic cells has been a significant advance in the field of solar energy. While tens of thousands of photovoltaic cells bring power to villagers in remote areas of Africa and Latin America, this technology remains quite expensive. Still more experimental is fusion energy, which produces energy by forcing the nuclei of atoms together. Fusion promises an endless supply of virtually pollution-free energy, but the research and implementation will require a large-scale investment. One proposed fusion research project in California would require roughly $1 billion from the United States. Meanwhile, an international fusion research effort that would include U.S., Japanese, Western European, and Russian scientists in a plan to build a prototype fusion reactor would carry a $6 billion price tag for the nations involved.

Questions

1. Should limitations on the emissions of greenhouse gases be placed on industries worldwide? On individuals? Can industries be forced to convert to nonpolluting energy sources?

2. How should the costs of research, development, and implementation of new energy technologies be managed?

3. Suppose that in a developed country, research on fusion energy succeeds. Scientists and engineers perfect ways to substitute fusion energy for many functions now powered by fossil fuels. This research took several years and cost billions of dollars. Under what circumstances should this technology be shared with other nations of the world?

Law in Outer Space

Who controls what is in outer space?

Lieutenant Colonel William G. Schmidt

Update on Law-Related Education, 21.1, 1997, pp. 45–52. © 1997 American Bar Association.

Do you feel pride when you watch a space shuttle launch or see the pictures that our astronauts send back to earth? Have you dreamed of being a shuttle pilot or mission specialist orbiting the earth and advancing our knowledge of space so that future generations may go beyond earth orbit and colonize the moon and the planets? Today, space travel seems almost routine. There were seven space shuttle missions in 1995. Seven missions have been scheduled for 1996 and another eight in 1997. The United States and other countries are also using unmanned rockets to launch satellites that improve global communications, survey earth resources, provide information about the weather, and gather intelligence. The *Challenger* disaster in 1986 should remind us, however, that there are risks.

When an accident occurs and people are killed or injured or property is damaged or destroyed, people will want compensation. Compensation, however, is not the only issue that space exploration has generated. Others issues: Who owns the moon and the planets? Can a country, corporation, or individual mine the moon or the planets and retain all profits? Can weapons be stationed in space? If an astronaut becomes stranded, do countries that did not create the crisis but can help have an obligation to do so? If an astronaut commits a crime while in space, who has jurisdiction to prosecute him or her?

Many of these questions have already been addressed in a series of international agreements that were negotiated beginning in the 1960s. Others are being addressed in the context of the initiative to build and launch an international space station. Some questions remain for future generations and will be answered only when problems arise and solutions are required. This article will look at the process that has been used to create space law and the treaties that have been concluded. It will also look briefly at the international space station program and the issues that program has generated. Finally, some thought will be given to the future: where do we go from here and what will space law look like when we finally do leave earth orbit and colonize the moon and the planets?

The United Nations Process

International law is frequently an exercise in crisis management. Two or more countries have a disagreement over an action or an issue, and they settle that disagreement peacefully by negotiating an agreement. Frequently, no side achieves all it wants, but the settlement is peaceful and the new rules become the basis for behavior. Other countries may accept the new rules by ratifying the agreement if it is open for ratification or by following the rule in practice. If enough countries follow a rule in practice over a long period of time, the rule may become customary international law, binding all nations. Rarely, however, do countries gather before a crisis to discuss a subject and formulate rules of behavior. Interestingly, the process that was used to develop early space law is one of those rare events.

On October 4, 1957, the Soviet Union launched *Sputnik* 1. At the time, one country could not lawfully fly a military aircraft that was not in distress over another country's territory without first obtaining permission from the country that would be overflown. The Soviet Union did not obtain permission to orbit *Sputnik*. By launching *Sputnik* into orbit, however, it did compel governments to ask whether *Sputnik* was a military aircraft and whether existing rules were valid. In short, the world started to think in earnest about space law. The debate occurred within governments and in the United Nations. In less than two months, it was answered when the United Nations General Assembly adopted a resolution (G. A. Res. 1148

Lieutenant Colonel William G. Schmidt is Professor of Law and Deputy for Elective Courses at the Air Force Academy in Colorado Springs, Colorado. He teaches Air and Space Law, Comparative Legal Systems, International Law, and Law for Commanders to cadets taking legal studies or one of the other 26 majors offered at the academy. The opinions expressed in this article are his alone and do not represent the official position of the Department of Defense, the United States Air Force, or the Air Force Academy.

[XII] 1957) declaring that "outer space shall be exclusively for peaceful and scientific purposes."

The requirement that space be used for scientific purposes was deleted 13 months later when the General Assembly adopted another resolution (G. A. Res. 1348 [XIII] 1958). That resolution decreed that space would be "used for peaceful purposes only" and established an Ad Hoc Committee on the Peaceful Uses of Outer Space (UNCOPUOS) to study principles and methods for achieving that goal. Over the years, UNCOPUOS has grown in size as the number of countries that belong to the United Nations has grown and more countries have become interested in space law. Today, UNCOPUOS has 61 members. It conducts studies and drafts international agreements. A great deal of its work occurs in two subcommittees: the Legal Subcommittee and the Scientific and Technical Subcommittee. Draft agreements are reviewed first by all UNCOPUOS members and, when approved by consensus, are forwarded to the General Assembly.

If the General Assembly approves of the agreement, it adopts a resolution that supports the agreement and recommends ratification by all countries. UNCOPUOS was responsible for drafting five agreements that form the fabric of international space law: the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (1967); the Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched Into Outer Space (1968); the Convention on International Liability for Damage Caused by Space Objects (1972); the Convention on the Registration of Objects Launched Into Outer Space (1975); and the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (entered into force in 1984, but not ratified by the United States).

In addition, the U.N. drafted four sets of nonbinding principles that the General Assembly has adopted as resolutions: The Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space (G. A. Res. 1962 [XVIII] 1962)—many of the principles that appear in this resolution were incorporated into the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies; Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting (G. A. Res. 37/92 1982); Principles Relating to Remote Sensing of the Earth From Outer Space (G. A. Res. 41/65 1986); and Principles Relevant to the Use of Nuclear Power Sources in Outer Space (G. A. Res. 47/68 1992).

Outer Space Treaty

Formally known as the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, this agreement is, arguably, the most important space law document. It establishes general principles that govern activities in space and specifically prohibits some activities. Under the Outer Space Treaty, nations have an obligation to conduct their activities "in accordance with international law, including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international cooperation and understanding. ... Outer space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty ... ," but instead is "free for exploration and use by all states without discrimination of any kind. ..." States that are "Parties to the Treaty undertake not to place in orbit around the Earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner."

They also agree not to establish military bases, installations, and fortifications; test weapons; or conduct military maneuvers on the moon or other celestial bodies consistent with their obligation to use the moon and other celestial bodies "exclusively for peaceful purposes." Astronauts are recognized as "envoys of mankind," and nations that have ratified the treaty agree to give them "all possible assistance" in outer space, on a celestial body, or "in event of accident, distress, or emergency landing on the territory of another State party or on the high seas." Parties to the treaty accept legal responsibility to compensate other governments and individuals who are injured as a result of launches and other space activities regardless of whether such activities are performed officially by government organizations or by private businesses or persons subject to that government's control. Nations agree "on the basis of equality" to let other nations observe space launches "to the greatest extent feasible and practicable"; to keep other nations informed about "the nature, conduct, locations and results" of space activities; and, on a basis of reciprocity, to permit people representing other governments to inspect "stations, installations, equipment, and space vehicles on the moon and other celestial bodies."

Note that the Outer Space Treaty does not prohibit countries from using space to conduct some military activities. Thus, countries may orbit satellites that gather information about other countries, and military personnel may be astronauts as long as their activities are limited to scientific research or other peaceful purposes. The Outer Space Treaty does not contain an enforcement mechanism, i.e., there is no formal procedure that one country can use to complain that another country has violated the treaty.

This is not unusual in international practice in which countries expect other countries to fulfill their obligations in good faith and rely on established mechanisms such as diplomatic protest, sanctions, etc., to protest a breach and encourage compliance. In general, space-faring nations have observed Outer Space Treaty principles and prohibitions to the letter and spirit of the law.

Rescue Agreement

The Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space clarifies and, to some extent, goes beyond the general obligations assumed by countries that have ratified the Outer Space Treaty. In the agreement, parties promise (1) to render all possible assistance to astronauts who need help in outer space, on celestial bodies, or because they land due to accident, distress, or emergency on that country's territory or on the high seas and (2) to return space objects to the country or countries that launched them. Countries that ratify the Rescue Agreement agree to keep the Secretary General of the United Nations and the country or intergovernmental organization that has jurisdiction over astronauts who are in trouble or that launched the space object being recovered (the "launching authority") informed of all actions taken to effect a rescue or recover an object. Parties to the agreement are also encouraged to participate in rescue operations that occur in areas not under their control when necessary to ensure the safe and prompt return of astronauts.

Countries that recover space objects at the request of a launching authority have the right to control recovery operations that occur in their territory and may charge the costs of the operation to the launching authority. The launching authority also has obligations: it must cooperate with a country that conducts rescue or recovery operations if its assistance would "contribute substantially to the effectiveness of search and rescue operations" or the space object being recovered is "of a hazardous or deleterious nature."

Fortunately, rescue and recovery operations have been necessary in only a few cases since the Rescue Agreement entered into force. One of the most important operations occurred in 1978–79, after the Soviet satellite *Cosmos* 954 fell from orbit and landed in Canada. Although designed to survive reentry and land, undamaged, in the Soviet Union, *Cosmos* 954 did not achieve the proper orbit and fell, uncontrolled, to earth. The nuclear reactor that powered the satellite was not destroyed on reentry and, as a result, areas of northern Canada estimated to be about the size of Rhode Island were contaminated by nuclear waste. Canada spent approximately $7 million to recover the parts of *Cosmos* 954 that survived reentry and to decontaminate its territory. Lawyers may disagree about the source of the legal obligation that the Soviet Union had to pay Canada for conducting this operation (the Rescue Agreement or the Convention on International Liability for Damage Caused by Space Objects), but the Soviet Union paid the costs of this operation even though it never asked Canada to return recovered parts (1968).

Liability Convention

Most people would agree that countries should compensate individuals or other countries when the individuals or countries are injured by space operations, including launches. This principle was accepted first in the Outer Space Treaty. The treaty signers agreed that "each ... party to the treaty that launches or procures the launching of an object into outer space, including the moon and other celestial bodies, and each ... party from whose territory or facility an object is launched, is internationally liable for damage to another party to the treaty or to its natural or juridical persons by such object or its component parts on the Earth, in air space or in outer space, including the moon and other celestial bodies."

Nations did not agree, however, on the legal test for liability. Under U.S. law, people ordinarily will not be liable to compensate someone else who is injured unless the injured party can show that the first person breached some duty that he or she owed to the injured party and that this breach caused the injury. In a limited number of situations (e.g., blasting, crop dusting), however, an activity is considered to be ultrahazardous, and people can be held liable without fault (absolute liability) if they injure someone while conducting this activity even if they use extreme care while doing so.

When the Liability Convention was negotiated, governments had to decide if space operations are so hazardous that there should be absolute liability if injury occurs or, in the alternative, if liability should be imposed only in cases where an injured party can prove breach of a duty and causation. The outcome was a compromise. Pursuant to the Liability Convention, a launching state is "absolutely liable to pay compensation for damage caused by its space objects on the surface of the Earth or to aircraft in flight." The launching state can escape liability only if it can show that it conducted the operation "in conformity with international law" (including the Outer Space Treaty) and that the injury resulted "either wholly or partially from gross negligence or from an act or omission done with intent to cause damage on the part of a claimant state or of natural or juridical persons it represents."

If the injury or damage occurs somewhere other than the surface of the Earth or to an aircraft in flight, the launching state is liable only if "the

50

damage is due to its fault or the fault of persons for whom it is responsible." An injured party (government or individual) must submit its claim for damages within one year of the date of the incident or the date that the identity of the launching state becomes known (whichever is later). Claims are submitted through diplomatic channels and must be paid or denied by the launching state within one year. If the claim is not paid in full, or partial settlement agreed within one year, a Claims Commission will be established to hear and resolve the dispute. Although the Liability Convention establishes important principles that facilitate dispute resolution and, in doing so, promotes space activities, it cannot be used to assign liability in every case of property damage or personal injury. The growing problem with space debris illustrates this point.

Space debris is becoming more of a problem as more objects are launched into space and the likelihood of collisions increases. As importantly, it is often impossible to tell which country owns a piece of space debris. Even small objects can cause major damage. Consider, for example, the damage that was done to our space shuttle when it struck a small paint chip that was floating in space; the shuttle was moving at such tremendous speed that its outer window was cracked. In that case, NASA scientists were able to determine that the paint chip was of U.S. manufacture. It will not always be possible, however, to determine ownership and responsibility.

Registration of Space-Launched Objects

Under the Outer Space Treaty, governments are not required to inform other governments when they conduct a space launch. Instead, nations that ratify the treaty are required only to consider requests made by other nations to allow their representatives to observe space launches. The frequency and conditions of observation are also left to future discussions and do not have to occur at all unless both nations have an equal right to observe the other's operations. The treaty encourages countries to keep the Secretary General of the United Nations, the public, and the international scientific community informed about space operations but does not require them to report. In many respects, this approach reflects a Cold War mentality.

When the Outer Space Treaty was negotiated in 1967, many space launches were classified military operations, and major space-faring nations such as the Soviet Union and the United States were not interested in giving each other information about all operations. In 1975, when the Registration Convention was concluded, the situation was somewhat different. The Registration Convention created new obligations. Governments that ratify this treaty agree to establish and maintain a system of records in which they record information about all space objects launched into orbit or beyond.

Governments also agree to provide, at a minimum, the following information to the Secretary General of the United Nations: the name of the launching state or states; an appropriate designator or registration number for the space object; the date and location of the launch; orbital parameters, including nodal period, inclination, apogee, and perigee; and information about the general purpose of the space mission or object. Parties to the Registration Convention also agree in principle to share information about ownership of space objects when an object causes damage and there is a question about which country launched it. In general, these rules reflect the growing concern that space-faring nations have about space debris. As more objects are launched into space, the likelihood of a collision causing injury or damage increases, and countries are interested in determining who is responsible so that the rules in the Liability Convention can be applied.

Moon Treaty

Of the five agreements that were negotiated using the United Nations process, the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies is by far the most controversial. To date, only nine nations have ratified the Moon Treaty even though it has been open for signature and ratification since December 18, 1979. Many provisions are not controversial. For example, the treaty requires that "[a]ll activities on the moon, including its exploration and use, shall be carried out in accordance with international law. . ." It requires countries to use the moon and other celestial bodies "exclusively for peaceful purposes," prohibits "[a]ny threat or use of force or any other hostile act or threat of hostile act on the moon" or any other celestial body, and reiterates the prohibitions that appear in the Outer Space Treaty on establishing military installations or testing weapons on the moon or other celestial bodies and on stationing nuclear weapons or other weapons of mass destruction in space.

Space-faring nations have not ratified the Moon Treaty, however, because it also calls for countries to establish an "international regime" to regulate missions to the moon and other celestial bodies, to develop and use its resources, and to share profits derived from those missions. This is to ensure that "the interests and needs of the developing countries, as well as the efforts of those countries that have contributed either directly or indirectly to the exploration of the moon, shall be given special consideration."

The Moon Treaty is not the first agreement that proposes an international organization to regulate exploitation of resources not under the exclusive control of one or more countries. An international regime to regulate deep seabed mining was proposed when the Law of the Sea (LOS) Convention was negotiated and, in fact, became part of that Convention.

Although the United States refused to ratify the LOS Convention for many years because it objected to international control of deep seabed mining, those objections have been largely overcome by changes to the LOS Convention that the United States helped negotiate. It is too early to tell whether the Moon Treaty can be renegotiated to make its language on an international regime acceptable to all space-faring nations.

One factor, however, will remain constant: space missions are very risky, expensive endeavors. This is true especially of missions that are attempted for the first time. The risks and expenses that are predicted for a specific mission may be acceptable only if the government or corporation that is funding the mission expects to obtain a reasonable recovery on its investment. Any treaty that limits that expectation or requires one country to share its profits with other countries will, at least in the initial stages of exploration and development, probably be unacceptable to countries that assume those risks.

Other Sources

Although the United Nations Committee on Peaceful Uses of Outer Space still exists and remains an important organization in which U.N. member nations discuss and debate space law problems, it is not the only source of space law. Rules affecting space operations also appear in multilateral agreements, not negotiated by UNCOPUOS, that are open for ratification by every country of the world. The agreements that regulate use of the geostationary orbit fall within this category. Sometimes, an open multilateral agreement will address another subject but contain provisions affecting activities in space. The Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water is a notable example of this kind of agreement.

Space-faring nations have also concluded bilateral agreements as well as multilateral agreements that are open only to a limited number of countries. The agreements, which establish the various regional satellite organizations (Intersputnik, Arabsat, Eutelsat, and Eumetsat) are examples. So are the agreements that the United States, Canada, Russia, Japan, and the European Space Agency have concluded to develop and launch the international space station. Bilateral and limited multilateral agreements may be formal and subject to ratification using procedures required by the law of each country that will become a party. In the alternative, they may be informal, oral, and intended initially to resolve an immediate problem. If enough countries adopt a practice, however, and it becomes the agreed method of solving the same problem when it arises again, the practice may become binding as customary international law.

Private organizations also contribute to the development of space law. These organizations sponsor seminars and encourage members to make presentations or publish papers that promote discussion. Not infrequently, people who work space law issues for international organizations or national governments join these private organizations or attend their meetings. So do academics, lawyers, and people who work in space-related businesses. The Forum on Air and Space Law of the American Bar Association is one such organization. The International Institute of Space Law (IISL) is another. The IISL was established by the International Astronautical Federation in 1960. Since its creation, it has sponsored 38 conferences in which experts have met and discussed space law issues. Papers that these experts publish in IISL *Proceedings* or elsewhere frequently become a starting point for discussions and ultimately influence development of space law.

Hot Topics in Space Law

The Outer Space Treaty and its progeny are a beginning, but they do not address or resolve every aspect of space endeavors. When these treaties were negotiated, the world was a different place: the Soviet Union existed, the Cold War raged, and space-faring nations judged their interests in the context of that environment. Still, there were incentives to negotiate agreements that limited military activities in space and required cooperation. The expense of an arms race in space and the probability that astronauts would die after an accident if other countries refused assistance were, economically and politically, unacceptable. Today, Russia has replaced the Soviet Union as a permanent member of the U.N. Security Council, Russia and the United States are not engaged in a space race against each other, technology has advanced dramatically, and private enterprise is much more interested in the commercial opportunities available in space. These changes have given rise to a new set of issues, some of which are being discussed in UNCOPUOS or resolved by countries in the context of currently ongoing programs.

Defining the Limits of Space

Countries of the world have yet to agree on where airspace ends and space begins. Some people argue that it is not necessary, at least immediately, to define the limits of space because countries have been able to use space peacefully and productively even in the absence of agreement. Others argue that it is time to reach agreement because the treaties on space law apply only in space and important rules that apply to the use of airspace are different. For example, although some countries have an anti-satellite capability and reserve the right to attack another country's satellites in time of war, in peacetime these countries allow other countries to orbit satellites above their territory even

when those satellites are used to collect information. In contrast, nations may prohibit flights of military and civil aircraft over their territory and may intercept and, in some cases, destroy another country's aircraft when the overflight is not permitted. The space law rules that establish liability for damage caused by space objects are also not the same as the rules that are applied when damage results from an aircraft accident. If countries of the world are able to reach agreement on where space begins, they will know when space law applies and reduce the potential for disagreement. This issue is being discussed in the Legal Subcommittee of UNCOPUOS.

Space Debris

Today, the United States Space Command tracks over 7,000 objects that have been launched into space. Only large objects (at least 0.1 meter in diameter at low earth orbit and 1 meter in diameter in geosynchronous orbit) can be tracked, however. Some experts believe that we are tracking only 10 to 20 percent of total space debris. As more nations become "space capable," the number of objects in space will increase. With the increase, the likelihood of a serious accident will grow. Space law does not require nations to remove space debris nor does it establish an obligation to track debris or to report tracking information to other governments or to an international organization such as the United Nations. Instead, it requires only that governments maintain records of objects launched into space and that they pay damages if there is enough evidence to establish fault. Even without these obligations, however, most space-faring nations have established programs to reduce the threat posed by space debris. Spacecraft design is one solution. Establishing and maintaining an active program to track debris is another. Some countries have considered strategies for reducing or eliminating the threat by boosting dead satellites into much higher orbits. The problem is also being studied by the Scientific and Technical Subcommittee of the UNCOPUOS and by other groups. The International Law Association has even published a Draft Convention on Space Debris that may become the basis for discussion in the future. Although current strategies have been successful in controlling the threat space debris currently poses, in the future they may not be enough. More international cooperation may be necessary to fund tracking expenses, or missions to actually remove dead satellites and other debris may have to be conducted.

Commercial Use of Space

Early space activity was the domain of governments. The technology was new and expensive, and businesses did not see enough benefits in conducting private space missions to justify the risks. In the beginning, corporations participated in space activities by building and launching systems purchased by governments. Gradually this changed. Technology proved reliable, and opportunities to make a profit arose. This became true especially in the area of communications. Satellites could be placed in geostationary orbit (a doughnut-shaped track approximately 22,300 miles [35,800 kilometers] above the equator where a satellite travels at a speed that allows it to remain over a fixed location on earth) and used to transmit radio and television signals at the speed of light from points thousands of miles apart. Communication by satellite would become much cheaper and more reliable than other means.

Fair use of the geostationary orbit, however, created problems. In contrast to most other orbits, the geostationary orbit is a finite resource. That is, only a limited number of satellites (originally estimated to be about 1,800) can be placed in geostationary orbit without creating interference with use of this orbit by other satellites. Fortunately, countries of the world were able to find a solution that allows all countries, either individually or working through organizations such as the International Telecommunications Satellite Organization (INTELSAT) to use this orbit now and in the future. This system requires registration and fair allocation of available positions in the geostationary orbit and is regulated by the International Telecommunications Union, an agency of the United Nations. It even permits one country to rent its positions to other countries.

Communications is not the only commercial use for space. Companies have used satellites to map the earth and search the earth for resources. Companies have produced and marketed devices that allow other companies and private citizens to use the Global Positioning System, which the United States developed originally for military purposes. In the future, companies may want to use space and its zero-gravity environment to grow crystals or produce other products that cannot be produced as well on earth. Proposals have also been made to mine the moon and other celestial bodies or to use space as a platform for collecting energy from the sun and transmitting it to earth.

The United States is a leader in encouraging commercial uses of space. Congress passed the Commercial Space Launch Act (49 U.S. Code, Ch. 701 [1994]). It permits private businesses to use U.S. government launch facilities, facilitates joint space missions (public-private partnerships), and limits the amount in damages a private corporation must pay to parties who are injured during a space launch from a government facility. This law and commercial use of space received a boost from the president on September 19, 1996, when he approved and announced a new comprehensive national space policy. The fundamental goal of this new policy is "to sup-

port and enhance U.S. economic competitiveness in space activities while protecting U.S. national security and foreign policy interests."

It is too early to tell whether the new policy will stimulate increased activity by private business in space. In general, businesses will pursue available options if the opportunity to make a reasonable profit justifies all risks. If there is little or no opportunity to make a profit, there will usually be little or no commercial activity. In this regard, some people argue that the Moon Treaty must be renegotiated. To date, there has been little interest in missions to the moon or other celestial bodies to mine their resources. In the future, that may change. When it does, private business will have more incentive to fund those missions if it knows that it does not have to share profits with countries that contribute very little to the mission and incur none of the risks. Although the Moon Treaty has been ratified by only nine nations, the uncertainty it creates may be enough to discourage commercial operations.

The International Space Station

The International Space Station (ISS) is one of the most interesting and controversial projects being pursued. For the United States, its origins go back to January 1984 when President Reagan directed the National Aeronautics and Space Administration (NASA) to develop a permanent space station as a successor to Skylab. In 1988, Canada, the European Space Agency (representing nine European countries), and Japan joined the U.S. program, and the new space station was named Freedom. After Russia replaced the Soviet Union in 1990, talks began in earnest about adding Russia to this coalition. The Soviet Union and Russia have had an active space station program since 1971 when the Soviet Union launched *Salyut I*. *Mir*, the Russian space station currently in orbit, is their seventh space station. Because lessons learned in that program would be useful in building and operating an ISS, agreement was reached in 1993 that allowed Russia to join the ISS program. Today, the ISS does not have a name. The Freedom program was terminated when the partners decided that the design was too large and expensive to deploy. In 1993, Freedom was redesigned and renamed Space Station Alpha, although the new design looked like a smaller version of the Freedom.

Subsequent discussions involving the United States, Russia, and the other partners have led to agreement on a three-phase approach. During Phase I (which will run into 1998), the U.S. will use the space shuttle to ferry U.S. astronauts to and from *Mir* where they will live with Russian cosmonauts and obtain space station experience. During Phase II (1997–98), the United States and Russia will jointly place a space station in orbit. Phase III (1998–2002) will see expansion of the joint space station by adding modules constructed by the remaining partners. When the ISS is finally deployed, it will have enough room to accommodate an international team of six astronauts. As an international project, the ISS is forcing discussion of issues that previously were discussed only in abstract but not resolved. Jurisdiction is one such issue. For example, which country has jurisdiction to prosecute crimes that may be committed on board the ISS when astronauts are from different countries? Another issue is command and control. These issues are important because future space missions may have international crews. They show that space law is not complete. Instead, there are many issues that have not been addressed and resolved.

Conclusion

In principle, space law is no different from other branches of law: it must possess a capacity to expand and change as circumstances change so that it encourages human growth and exploration. Simultaneously, it must discourage, if not punish, conduct that is unacceptable to most human beings. Today's space law was written in anticipation of missions not flown and technologies not developed. As a result, it speaks primarily in terms of broad principles. Still, these principles are visionary. They encourage nations to cooperate with one another and require nations to conduct space activities peacefully. They promote peaceful resolution of disputes and establish a protected status for astronauts. They declare that exploration and the use of space is the province of all mankind. Because the first generation of space law did not address all issues, a second generation must be developed. Should it be developed now in UNCOPUOS like the first generation, or should we await new missions and technologies and an international convention on space law? The International Space Station is a catalyst for discussing these questions. There is work to be done. The success that future generations achieve in answering these questions will determine how successful human beings are in using space.

Sources

Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, July 11, 1984.

Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched Into Outer Space, 18 UST 7570, TIAS 6599, 672 UNTS 119 (1968).

Convention on International Liability for Damage Caused by Space Objects, 24 UST 2389, TIAS 7762, 961 UNTS 187 (1972).

Convention on the Registration of Objects Launched Into Outer Space, 28 UST 695, TIAS 8480, 1023, UNTS 15 (1975).

Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, 14 UST 1313, TIAS 5433 (1963).

Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, 18 UST 2410, TIAS 6347, 610 UNTS 205 (1967).

U.N. General Assembly Resolution 1148 (XII), November 14, 1957.

U.N. General Assembly Resolution 1348 (XIII), December 13, 1958.

U.N. General Assembly Resolution 1962 (XVIII), December 13, 1962.

U.N. General Assembly Resolution 37/92, December 10, 1982.

U.N. General Assembly Resolution 41/65, December 3, 1986.

U.N. General Assembly Resolution 47/68, December 14, 1992. ♦

A Seedling ...

continued from page 17

ble court suggested several broader points. That U.S. support for this new court was indispensable should confirm, for example, that sustained U.S. support is also essential to the Bosnian peace process. The symbolic importance of this untested court should also tell us that any reintegration of Bosnia will depend not only on credible domestic courts, but also on effective prosecutions before the war crimes tribunal now operating in The Hague.

The Bosnian constitutional court should also remind us that ultimate answers to ethnic conflicts will not be found in gerrymandered national boundaries, but will, in the end, require personal commitment and individual action. And, perhaps most important, these six Bosnian judges demonstrate how the quiet acts of a few courageous individuals can produce a hopeful, if fragile, seedling, even in Sarajevo. ♦

Forum Deferred . . .

We regret that space constraints prevented *Update* from featuring a Student Forum in this edition. Look for this feature to be continued in our Law Day edition next spring!

HAVING A PROBLEM WITH YOUR SUBSCRIPTION?

Send us your label and check the appropriate boxes below to make adjustments to your subscription.

☐ Receiving duplicate copies.
(Please send both labels.)

☐ Change of address.
(Please send old label and new address.)

☐ Receiving invoice, already paid.
(Please send us a copy of the invoice and proof of payment.)

☐ Other: _____

☐ **Start subscription.** ($30 one year/ UPDATE PLUS package, 9 mailings.)
Payment enclosed.

Or charge my: ___ Visa ___ MasterCard _____ Account No.

_____ Exp. Date

_____
Name

_____
Title

_____
Address

_____
City, State, Zip

Attach label here...

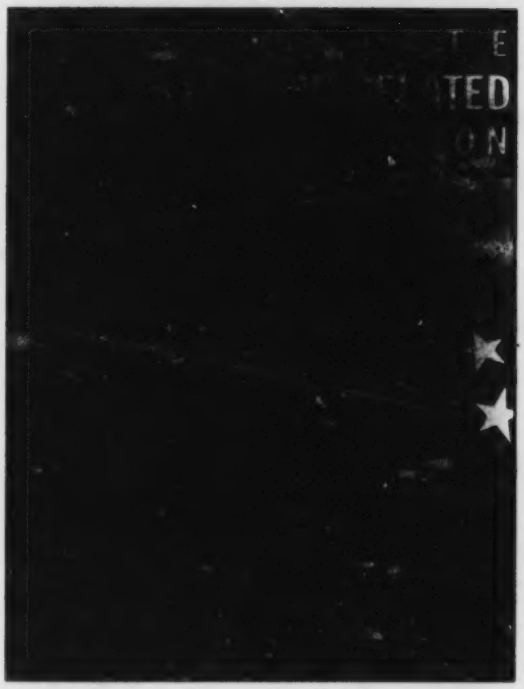
Attach your present mailing label here.

Mail to:
UPDATE PLUS
Circulation Manager
American Bar Association
YEFC (15.3)
541 N. Fairbanks Court
15th Floor
Chicago, IL 60611-3314

Law-Related Education Essentials Matrix

From *Essentials of Law-Related Education*. © 1995 American Bar Association.

	TS p. 9	TS p. 12	TS p. 18	TS p. 28	TS p. 32	TS p. 40
Subject Matter						
Law						
What types of law are, including international law		x		x	x	x
Liberty						
Concept of human rights—including individual, political, social, and economic rights	x	x	x	x	x	
Fundamental constitutional rights						
. . . freedom of the press			x			
Civil rights	x	x				
Contexts and Practices of Instruction						
Conditions Necessary for Effective LRE Instruction						
Access to, and use of, community resource leaders		x	x			
Access to, and use of, exemplary instructional materials	x	x	x	x	x	x
Student-centered classroom	x	x	x	x	x	x
Problem-oriented approach to instruction				x	x	x
Developmentally appropriate instruction	x	x	x	x	x	x
Instructional Strategies						
Instruct interactively						
. . . use cooperative learning strategies, simulations, and role plays		x		x	x	x
. . . use group work activities, including group research projects	x	x	x			
Develop curriculum						
. . . balanced	x	x	x	x	x	x
. . . relevant	x	x	x	x	x	x
. . . deliberate in consideration of controversial issues		x	x	x	x	x
Assessment						
Assesses students' values, interests, experiences, and knowledge prior to, and after, instruction	x		x		x	x
Bases assessment on performance and outcomes		x		x		
Skills						
Research						
Knowing how to acquire information related to the law and legal issues in libraries and other repositories		x	x	x	x	
Organizing information	x	x	x	x	x	
Thinking						
Developing capacity for understanding and evaluating controversies and conflicts arising from legal issues		x	x	x	x	x
Communications and Social Participation						
Working cooperatively with others to make decisions and take actions concerning hypothetical or actual legal and law-related social issues				x	x	x
Attitudes, Beliefs, and Values						
Substantive						
Fostering respect for fundamental human rights and dignity	x	x	x	x	x	
Appreciating the value of legitimately resolving conflicts and differences in society		x		x	x	x
Procedural						
Understanding how attitudes, values, and beliefs essential to LRE are fostered through teaching of fundamental subject matter employing critical instructional practices	x	x	x	x	x	x



COMING THIS SPRING

Crime and Freedom
Articles, lessons, and educational resources focusing on timely issues, including

- The Powers of Law Enforcement
- The Rights of the Accused
- The Role of Juries
- The Rights of Victims
- Juveniles and Justice

SPECIAL COMMITTEE ON
Youth Education for Citizenship
AMERICAN BAR ASSOCIATION

DIVISION FOR PUBLIC EDUCATION

AMERICAN BAR ASSOCIATION
YEFC/15.3
541 North Fairbanks Court
Chicago, IL 60611-3314
http://www.abanet.org/publiced
(312) 988-5735
Internet: abapubed@abanet.org

ADDRESS CORRECTION REQUESTED

Non-Profit Organization
U.S. Postage
PAID
American Bar Association

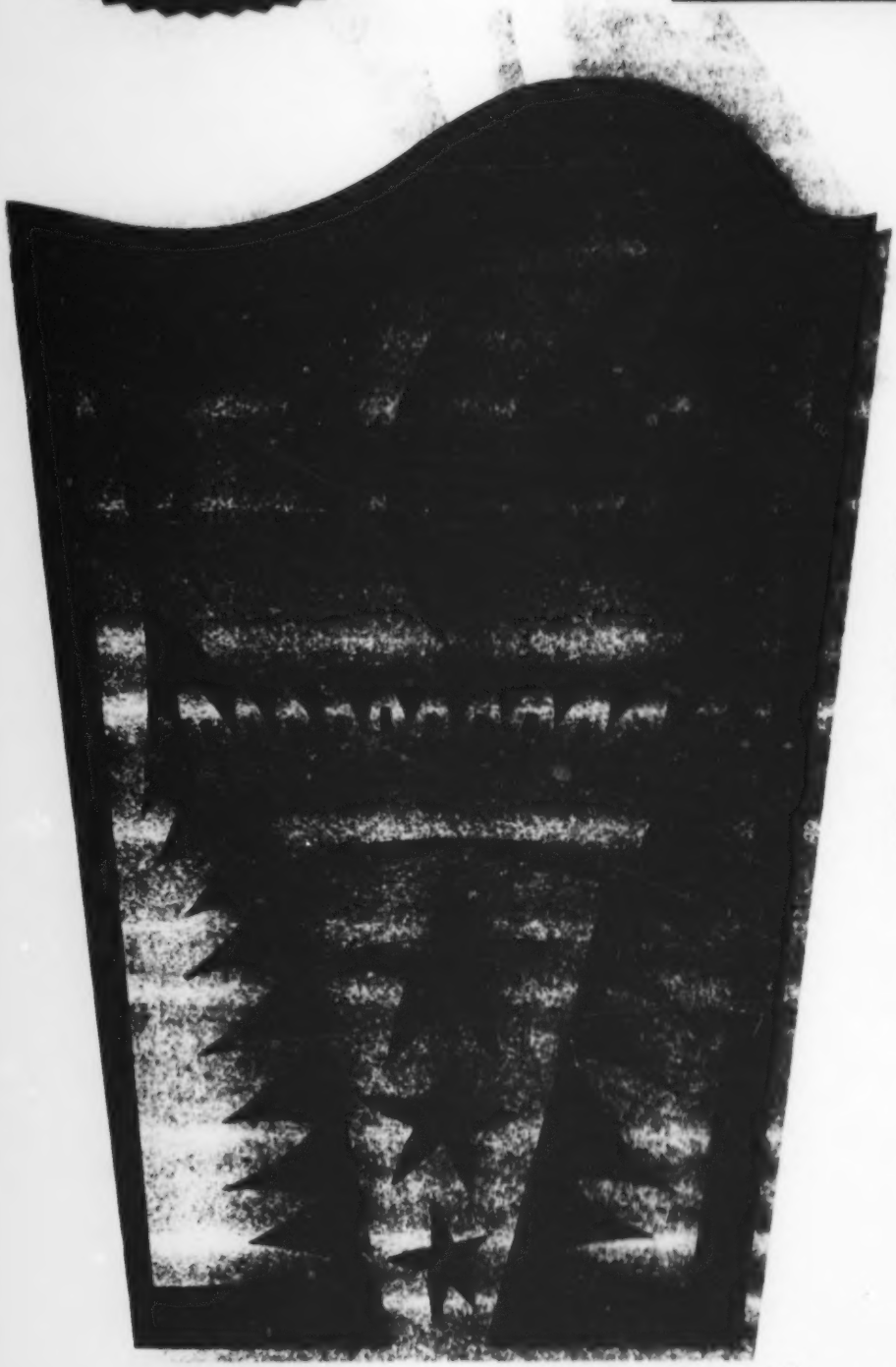
SPRING 1997 VOL. 17 NO. 2

UPDATE ON LAW-RELATED EDUCATION

American Bar Association Special Committee on Youth Education for Citizenship

$6.00

Special Issue!
Crime and Freedom
Protecting Public Safety and Individual Rights



Featuring Articles, Teaching Strategies, and Student Materials for the LRE Professiona

PLUS Your Law Day 1997 Student Edition of *Update*

58

Instructional Resources for This Issue

Bouza, Anthony V. *The Police Mystique: An Insider's Look at Cops, Crime, and the Criminal Justice System.* Plenum, 1990.

"Crime and Civil Liberties." Briefing Paper No. 2030. American Civil Liberties Union, Department of Public Education, 132 West 43rd Street, New York, NY 10036.

"The Death Penalty." Briefing Paper No. 2040. American Civil Liberties Union, Department of Public Education, 132 West 43rd Street, New York, NY 10036.

Good Times, Bad Times: Drugs, Youth and the Judiciary. Video. Citizenship/LRE Program for Maryland Schools, UMBC/MP 007, 5401 Wilkens Avenue, Baltimore, MD 21228.

An Inside Look at the Juvenile Justice System. Video. Alabama Center for Law and Civic Education, Cumberland School of Law, 800 Lakeshore Drive, Birmingham, AL 35229.

Juveniles and the Death Penalty. Video. Films for the Humanities and Sciences, P.O. Box 2053, Princeton, NJ 08543.

Kronenwetter, Michael. *Under 18: Knowing Your Rights.* Enslow, 1993. Social Studies School Service, 10200 Jefferson Boulevard, P.O. Box 802, Culver City, CA 90232.

Miller, Maryann. *Everything You Need to Know about Dealing with the Police.* Rosen, 1995. Social Studies School Service, 10200 Jefferson Boulevard, P.O. Box 802, Culver City, CA 90232.

Plea Bargains: Dealing for Justice. Films for the Humanities, 1994. Social Studies School Service, 10200 Jefferson Boulevard, P.O. Box 802, Culver City, CA 90232.

Reviewing the Verdict: Issues of the Police, Justice and Change. Participant guide, teacher's guide, and videotape. Constitutional Rights Foundation, 601 South Kingsley Drive, Los Angeles, CA 90005.

Sentenced to Die: Capital Punishment and the Eighth Amendment. Teacher's guide and videotape. Close Up Publishing, Dept. C47, 44 Canal Center Plaza, Alexandria, VA 22314.

Shackley, Theodore G. *You're the Target: Coping with Terror and Crime.* New World, 1989.

Steins, Richard. *The Death Penalty: Is It Justice?* Twenty-First Century Books, 1993. Social Studies School Service, 10200 Jefferson Boulevard, P.O. Box 802, Culver City, CA 90232.

Teens, Crime, and the Community. 3rd ed., 1992. Student book and teacher's manual. West Educational Publishing, School Division, 610 Opperman Drive, P.O. Box 64833, St. Paul, MN 55164.

Under 18 Under the Law. Video. Kentucky LRE, Administrative Office of the Courts, 100 Millcreek Park, Frankfort, KY 40601.

Cover Illustration by David Lee Csicsko Design by DePinto Graphic Design
Produced by Creative Services Associates, Inc.
©1997 American Bar Association
ISSN 0147-8648 PC #738-0100-2102
Funding for this issue has been provided by the American Bar Association Fund for Justice and Education; we are grateful for its support.
Update on Law-Related Education is published three times each year (winter, spring, fall) by the American Bar Association Special Committee on Youth Education for Citizenship. Chair: Allen W. Kimbrough; Director, Youth Education Programs: Ronald A. Banaszak; Director, Publishing and Marketing: Seva Johnson; Editor: Kenneth F. Fenske.
Update helps classroom teachers and law-related education program developers educate students about the law and legal issues. The views expressed in this document are those of the authors and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association, the Fund for Justice and Education, or the Special Committee on Youth Education for Citizenship.

A one-year subscription to the UPDATE PLUS package costs $30.00 and includes three issues each of *Update on Law-Related Education*, *Update on the Courts*, and *LRE Report* with the Plus Poster Page, as well as the special Student *Update* Edition for Law Day each spring.
For subscription and back issue information, contact American Bar Association/YEFC (15.3), 541 N. Fairbanks Court, 15th Floor, Chicago, IL 60611-3314; (312) 988-5735; http://www.abanet.org/publiced FAX (312) 988-5032, ATTN.: Nesael. Internet: abapubed@abanet.org
FOR CUSTOMER SERVICE, CALL (312) 988-5522.
All rights reserved. Printed in the United States of America.
The American Bar Association is a not-for-profit corporation.
Printed on recycled paper.
EdPress

—SCHEDULED FOR PUBLICATION THIS FALL—
DON'T MISS OUR SPECIAL EDITION ON
Civil Justice

Contents

Volume 21, Number 2
Spring 1997

Crime and Freedom

Protecting Public Safety and Individual Rights

2 Foreword ***William W. Taylor III***

4 The Cost of Justice in a Free Society
Laurie Robinson *investigates funding crime control and the criminal justice system.*

7 Juvenile Justice System: At the Crossroads
Stuart O. Simms *discusses the issue of greater restrictions for young people accused of crimes.*

9 **Teaching Strategy**—Juveniles and the Law
Gayle Mertz *helps students explore the juvenile justice system and how to improve it.*

11 Drugs: The Unstated Draconian Costs
Stuart H. Deming *focuses on the awesome penalties for youthful offenders involved in drug activity.*

13 Maintaining Order—and the Rights of Citizens
John S. Farrell *examines law enforcement's complex web of federal, state, local, and private agencies.*

18 Your Rights as an Accused
Bruce Lyons and John P. Page *explore the right to say no and to ask for an attorney.*

22 Seeking Justice for the Victim
Richard T. Andrias *explains how victims of crimes, as well as defendants, have legal rights—and they are growing.*

24 Defendants' Rights in Criminal Trials
Ralph C. Martin II and Elizabeth Keeley *explore a system in which the rights of the accused are balanced against society's interest in justice.*

26 **Using the Student Edition** of *Update on Law-Related Education*
Ronald A. Banaszak *suggests activities that students can do in addition to reading the Student Edition articles.*

***Update* Student Edition** Celebrate Your Freedom!—Law Day 1997
This special booklet gives young people an opportunity to voice their opinions about rules and laws that affect a number of their activities, including school dress codes, curfews, and bans on "cruising the mall."

29 **Teaching Strategy**—Rights of the Accused
Students are offered an opportunity to explore the constitutional rights of the accused.

31 Seeking Justice in Federal Sentencing
Donald A. Purdy Jr. *presents information on reforms designed to ensure uniformity, predictability, and honesty in sentencing.*

36 Corrections, the Public Safety, and Offenders' Needs
J. Michael Quinlan *examines controlling criminals in ways that help them achieve lifelong reform.*

39 **Teaching Strategy**—Protecting Offenders' Rights
Mabel McKinney-Browning *helps students use the case-study approach to analyze a Supreme Court case involving prisoners' rights.*

42 Death Penalty in America
Amie L. Clifford *takes a look at risks, statutory protections, and constitutional rights.*

46 **Resource**—Legal Careers in Criminal Justice
Richard J. Wilson *explores the broad range of job opportunities in the criminal justice system in the areas of law enforcement, the courts, and the correctional system.*

49 **Student Forum**—Fair Trials and Free Press
Gayle Mertz *offers students the opportunity to explore the potential conflict between freedom of the press and the rights of defendants and victims.*

Update on Law-Related Education Editorial Advisory Board

Lee Arbetman
National Institute for Citizen Education in the Law
Washington, D.C.

Marshall Croddy
Constitutional Rights Foundation
Los Angeles, California

Frank Kopecky
University of Illinois
Center for Legal Studies
Springfield, Illinois

Gayle Mertz
Law-Related Education Network
Boulder, Colorado

Michael H. Reggio
Oklahoma Bar Association
Oklahoma City, Oklahoma

David Schimmel
Department of Educational Policy, Research, and Administration
University of Massachusetts
Amherst, Massachusetts

Beverly Barr Vaughan
Law and Government Magnet
Marshall High School
Rochester, New York

Foreword

Citizens polled throughout the United States consistently report crime as among the top concerns they believe should be addressed by their elected leaders. These leaders—federal, state, and local—have responded to public concern in various ways. In recent years, legislators have stiffened criminal penalties. The "three strikes–you're out" laws enacted in many states and the federal mandatory minimum sentences for various drug offenses are two illustrations. Thirty-seven states now authorize the death penalty, and this most final of punishments is available for serious federal crimes as well.

Legislatures and courts also have enhanced the ability of law enforcement agencies to gather evidence pivotal to their criminal investigations. These agencies may use such surveillance devices as wire-tapping and electronic eavesdropping, and they may search the persons, automobiles, and homes of those suspected of criminal activity. At each stage of the proceedings, however, government agencies must respect the rights of the people they are investigating—and this makes law enforcement more difficult.

Broad investigative and prosecutorial powers for law enforcement and prosecutors diminish, to some extent, individual freedom. At the same time, to protect individual freedom, the interest of society at large in punishing crime must, to some extent, give way. This process of balancing the interests of law enforcement against the rights of the citizen is the fundamental theme of our constitutional democracy. It is not an easy process, and it is almost constantly the subject of criticism by one or another segment of our society. This Crime and Freedom edition of *Update on Law-Related Education* addresses this inherent tension between protecting public safety on the one hand and individual rights on the other.

The articles in this edition outline the competing rights and obligations of the various actors in the criminal justice system: the accused, the government, the victims, and the larger community. The Fourth, Fifth, Sixth, and Eighth Amendments to the Constitution, which are part of the Bill of Rights, protect the accused at each stage of a criminal prosecution during the criminal investigation and the trial or plea bargain and at sentencing. They provide the right to privacy, i.e., freedom from having police search the accused's home or possessions without cause; the right against self-incrimination and to remain silent when police want to ask questions; the right to a speedy, public trial; the right to counsel; the right to confront and cross-examine accusers; and the right not to be tried twice for the same offense.

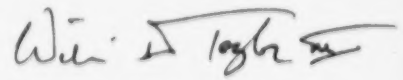
Perhaps the most important of these guarantees is the right to counsel, because with the aid of an experienced advocate, the accused is in the best position to decide whether, when, and how to exercise the full range of rights. It is vital to remember that these rights, so basic to living in a free society, are not mere technicalities; they are not just for criminals. Any person, innocent or guilty, may be a suspect in a criminal investigation. The rights guaranteed by the federal Constitution and state constitutions help ensure that the innocent are not mistakenly convicted of crimes and that all people are treated with dignity and respect.

Equally important in our criminal justice system, but sometimes overlooked, are the rights of the victims of crime. Courts and legislatures are increasingly addressing the needs of victims and their right to be heard with regard to important decisions in criminal cases. Reforms in the way rape cases are tried are a good example: rape shield laws in most states prevent a defendant from delving into the victim's sexual history. Courts are now more sensitive to maintaining victim confidentiality, and many police departments and prosecutors' offices have victim-assistance units. Many jurisdictions have taken steps to permit victims to participate in the criminal prosecution, allowing the victim or a relative to address the court at sentencing or comment at parole hearings. Reports prepared for courts at sentencing often include a Victim Impact Statement describing the medical, financial, and emotional impact of the crime on the victim. Measures have been implemented to compel those convicted of crime to make restitution to the victims for their financial losses.

Whether these incremental changes in the victims' rights arena are sufficient is vigorously debated today. Many states have enacted victim bills of rights, and there is now a strong push in Congress to amend the Constitution to guarantee victims the right to information, participation, and restitution during the criminal process.

Our system of justice in this country is complex, and the articles in this edition address the various components of that system, including the operation of the federal sentencing guidelines, the imposition of the death penalty, the juvenile justice system, the legal system's response to the widespread use and distribution of illegal drugs, and the role of the U.S. Department of Justice in monitoring the criminal justice system and gathering information about crime and the efficacy of preventative and correctional programs. The proper functioning of the criminal justice system, however, is not a responsibility entrusted solely to the care of professional actors in the legal system. Community involvement is essential to the enterprise, and it is our best hope of preventing and rooting out the causes of crime, while ensuring that law enforcement does not excessively intrude on the rights of citizens.

Finally, we want to encourage readers of this edition to consider a career in the criminal justice system. As described in greater detail within these pages, job opportunities available in law enforcement, criminal defense, the courts, and the correctional system can lead to exciting and rewarding careers. Criminal justice is a field in which you can truly make a difference. Think about it.



William W. Taylor III

Chair of the ABA Criminal Justice Section and a partner in the Washington, D.C., office of the law firm Zuckerman, Spaeder, Goldstein, Taylor & Kolker, L.L.P.

The Cost of Justice in a Free Society

Funding crime control and the criminal justice system

Laurie Robinson

Update on Law-Related Education, 21.2, 1997, pp. 4–6. © 1997 American Bar Association.

You have been accused of a crime. Police burst into your house in the middle of the night, search through your possessions, and arrest you. You are questioned and put in jail without a hearing or being told the charges against you. You are held in jail for six months without being able to talk to an attorney. Then one day you are taken to court. The judge says that you are guilty of crimes against the people and sentences you to 10 years in prison. You have no right of appeal.

Though this may sound like science fiction, this is how the criminal justice process actually operates in some countries. In the United States, however, we are protected by our federal Constitution and its Bill of Rights (the first 10 amendments) and by similar provisions in state constitutions. The Fourth Amendment to the Constitution prohibits unreasonable search and seizure. The Fifth Amendment guarantees you the right against self-incrimination. The Sixth Amendment guarantees every person accused of a crime the rights to a speedy and public trial, to a trial by jury, to hear the accusation, to confront prosecution witnesses, and to be represented by an attorney.

Laurie Robinson is one of 10 assistant attorneys general in the U.S. Department of Justice in Washington, D.C. Appointed by President Clinton in 1993, Ms. Robinson heads the Justice Department's Office of Justice Programs. She served from 1979 to 1993 as director of the ABA Criminal Justice Section and is now a member of the ABA Standing Committee on Strategic Communications.

Justice Expenditures

These constitutional protections come at a price. In 1990, federal, state, and local governments in the United States spent almost $74 billion for civil and criminal justice, a 22 percent increase since 1988. Three cents (or 3.3 percent) of every government dollar spent throughout the nation in 1990 was for justice activities: 1.4 percent for police protection, 1.1 percent for corrections, and 0.7 percent for judicial and legal services.

Because criminal and civil justice matters are primarily the responsibility of state and local governments, their share of justice expenditures is greater than that of the federal government. The federal government spent less than 1 cent of every dollar for justice in 1990, while state governments spent 6 cents and local governments almost 7 cents. State and local governments combined spent 87 percent of all justice dollars; the federal government spent 13 percent.

The 1990 survey by the Justice Department's Bureau of Justice Statistics shows that from 1985 to 1990, spending for criminal justice increased almost twice as fast as all other government spending. Despite this rapid increase, spending for criminal justice is dwarfed by other government expenditures. Social insurance payments, such as Social Security and Medicare, account for 31.4 percent of federal expenditures and 21 percent of state and local government spending. The federal government spends another 27.6 percent of its budget on national defense and international aid. And the state and local governments spend 19 and 38 percent, respectively, for education.

Other survey findings show that

—Federal, state, and local governments combined spent $299 per capita on criminal and civil justice in 1990. State and local governments spent $261 per capita.

—Expenditures for justice activities increased 61 percent in constant dollars per capita from 1971 to 1990. Spending for public defense increased the most, 259 percent, compared to 154 percent for corrections, 152 percent for legal services and prosecution, 58 percent for courts, and 16 percent for police.

—Federal government spending on justice increased 128 percent in constant dollars per capita from 1971 to 1990, more than twice as fast as the 54.5 percent increase among state and local governments.

—Per capita spending on all criminal justice activities ranged from less than $100 in West Virginia to more than $400 in New York and Alaska.

—In October 1990, the nation's civil and criminal justice systems employed 1.7 million individuals, with a total October payroll of almost $4.3 billion.

—Local governments spent over half of the nation's civil and criminal direct justice expenditure, or $39.5 billion, followed by state governments ($25.4 billion) and the federal government ($9.3 billion).

—Two-fifths, $31.8 billion, of the nation's total justice expenditure was for police protection and a third, $25 billion, was for corrections, including jails, prisons, probation, and parole. The combined activities of courts, prosecution and legal services, and public defense accounted for $16.5 billion, or 22 percent of the total.

Federal Crime-Control Leadership

To help federal, state, and local governments make more informed decisions about how to spend these justice dollars, the United States Congress created the Office of Justice Programs (OJP) within the U.S. Department of Justice in 1984. OJP provides federal leadership in developing the nation's capacity to prevent and control crime and delinquency, improve the criminal and juvenile justice systems, increase knowledge about crime and related issues, and assist crime victims.

OJP is composed of five program bureaus and three Crime Act Offices:

—The Bureau of Justice Assistance (BJA) provides funding, training, and technical assistance to state and local governments to combat violent and drug-related crime and help improve the criminal justice system. It administers the Justice Department's main source of financial assistance for state and local criminal justice—the Edward Byrne Memorial State and Local Law Enforcement Assistance program.

—The Bureau of Justice Statistics (BJS) is the principal criminal justice statistical agency in the nation. BJS collects and analyzes statistical data on crime, criminal offenders, crime victims, and the operations of justice systems at all levels of government. It also provides financial and technical support to state statistical agencies and administers special programs that help state and local governments improve their criminal justice records and information systems.

—The National Institute of Justice (NIJ) is the principal research and development agency in the Department of Justice. NIJ supports research and development programs, demonstrates innovative approaches to improved criminal justice, develops new criminal justice technologies, and evaluates effectiveness of programs.

—The Office of Juvenile Justice and Delinquency Prevention (OJJDP) provides grants to states to help them improve their juvenile justice systems. OJJDP sponsors innovative research, demonstration, evaluation, and training programs and provides technical assistance to help improve the nation's understanding of and response to juvenile crime.

—The Office for Victims of Crime (OVC) administers two grant programs created by the Victims of Crime Act of 1984. The Victims Assistance Program gives grants to states to support programs that provide direct assistance to crime victims. The Victims Compensation Program provides funding to state programs that compensate crime victims for medical and other unreimbursed expenses resulting from a violent crime. OVC also sponsors training for federal, state, and local criminal justice officials and other professionals to help improve their response to crime victims and their families.

—The Violence Against Women Grants Office administers the grant programs that were authorized by the 1994 Crime Act. These programs provide funds to state and local governments and Indian tribes to increase awareness of violence against women; to improve the investigation and prosecution of rape, sexual assault, and stalking; and to enhance services for victims of these crimes.

—The Drug Courts Program Office fosters the development and implementation of effective drug court programming at the state, local, and tribal levels. Drug courts provide intensive sanctions and treatment to help offenders break the cycle of addiction and the crime that accompanies it.

—The Corrections Program Office (CPO) provides grants to states and local governments to construct prisons for violent offenders or boot camps or other alternatives for nonviolent offenders to increase prison space for violent offenders. CPO also administers a grant program that provides funds to establish prison-based drug treatment programs.

Most OJP funds are awarded to state agencies that determine, usually in conjunction with a board composed of state and local officials from the various criminal justice components, how these moneys should be allocated. OJP also has a smaller amount of "discretionary" dollars, which it awards competitively for innovative programs to demonstrate new approaches and for training, technical assistance, and research and evaluation.

Federal Initiatives

In fiscal year 1997, which began October 1, 1996, OJP has a total budget of $3.2 billion—its largest ever and larger than that of any other Department of Justice agency except the Bureau of Prisons. With these funds, OJP is administering more than 15 new or expanded programs authorized by the 1994 Crime Act to improve the way justice is administered by the nation's criminal justice system. Current OJP initiatives include

—A focus on community-based initiatives. Because local communities play the key role in responding to crime, OJP is helping communities form comprehensive partnerships to prevent crime and improve the quality of life for residents. With a combination of federal, state, and local resources, community leaders develop strategic plans combining enforcement efforts, like street drug sweeps by police, with

an array of prevention efforts and educational and social services to eradicate crime and revitalize blighted neighborhoods.

—A move toward "community justice." Community justice is not a new program but a new approach to administering criminal justice. This new approach involves identifying public safety problems, creating partnerships within the community to address those problems, and building bridges among all parts of the criminal justice system. Community justice moves the focus away from arrest, prosecution, and adjudication and toward solving problems to prevent crime, reduce recidivism, and address a community's public safety needs. Community justice also includes community policing, in which police work closely with neighborhood residents to resolve crime-related problems, and community courts, which provide an array of justice-related and other services to community residents.

—Addressing violence by young people. Although recent FBI statistics show a dip in the rate of violent crimes by juveniles, juvenile violence is still a major problem in this country. OJP is working to reach young people before they take their first step into trouble and to deal quickly, firmly, and effectively with juvenile offenders. One new OJJDP initiative called SafeFutures is helping communities develop a continuum of care—services for children from their infancy through adulthood, encompassing prevention, strengthening of the family, mentoring, gang prevention and intervention, and graduating sanctions for juvenile offenders. Other major OJP efforts are working to keep guns out of the hands of minors, get dropouts back in school, and help communities institute constitutionally viable curfews to keep juveniles off the streets late at night.

—Preventing family violence. In addition to addressing the problem of violence against women, OJP has launched a new initiative to address child abuse and neglect. OJP research shows children who are abused and neglected are 38 percent more likely to later commit a violent crime and 53 percent more likely to be arrested as a juvenile. The Safe Kids-Safe Streets Initiative will develop comprehensive programs to prevent child abuse and neglect, provide services for families, and assist victims.

—Managing sex offenders in the community. About 234,000 convicted sex offenders are under the custody of corrections agencies on an average day in America. Nearly 60 percent are under conditional supervision, probation or parole, in the community. Unlike most other criminals, sex offenders often do not "age out" of crime. OJP is exploring ways to reduce recidivism by sex offenders and to protect the public, primarily women and children, from these violent predators. As a first step, OJP recently convened a symposium of medical and criminal justice system experts in dealing with sex offenders to help develop a strategy for improving the criminal justice system's management of these offenders.

Cost of Crime

These initiatives may not decrease the cost of administering justice in this country, but they may reduce the cost of crime—and the human suffering that crime causes. OJP research shows that crime imposes an annual "tax" of approximately $425 per man, woman, and child in the United States or a total of about $105 billion in lost wages, medical expenses, and property losses. When the values of emotional pain, suffering, and the risk of death to victims are factored in, crime costs victims an additional $345 billion every year.

Compared with the enormous cost of crime, the $74 billion tab for the justice system in the United States seems a small price to pay for efforts to ensure public safety. But, at a time when American taxpayers are looking for efficiency in government, should the criminal justice system be made more cost-effective by limiting some of the rights included in the Constitution and the Bill of Rights? And, if so, which one of those protections would you be willing to give up if you were accused of a crime?

Our American system of justice is based not on cost but on ensuring the rights of the individual. Under our justice system, an accused person is presumed innocent until proven guilty. The accused has the right to have a private attorney if he or she can afford one or a public defender who is paid by the government. The accused has the right to a jury trial when it would be much cheaper to let the judge alone decide the case.

Each of these rights is designed to ensure that an accused person receives the fairest possible treatment by the judicial system. If you were accused of a crime, wouldn't you want these rights rather than some other cut-rate form of justice? The cost of justice in a free society may be high. But isn't it worth the price?

Resources

Lindgren, Sue A. *Justice Expenditure and Employment, 1990*. Washington, D.C.: Bureau of Justice Statistics, U.S. Department of Justice. September 1992.

———. *Sourcebook of Criminal Justice Statistics, 1995*. Washington, D.C.: Bureau of Justice Statistics, U.S. Department of Justice.

National Institute of Justice, U.S. Department of Justice. *The Extent and Cost of Crime Victimization: A New Look*, 1996.

Office of Justice Programs, U.S. Department of Justice. *Office of Justice Programs Resource Guide*.

Web Sites

Office of Justice Programs
http://www.ojp.usdoj.gov ♦

Juvenile Justice System: At the Crossroads

Greater restrictions for young people accused of crimes

Stuart O. Simms

Update on Law-Related Education, 21.2, 1997, pp. 7–8. © 1997 American Bar Association.

Young people are at the center of one of the most critical debates in this country. Not since its establishment almost a century ago has the juvenile justice system been the focus of such intense change and continuing debate. At the center of the debate is the issue of whether state juvenile justice procedures should be changed in order to treat more juveniles like adults.

Background

Up to the beginning of the 20th century, states throughout the country allowed children to be arrested, detained, and prosecuted in the same way adults were. Although some states had established special facilities such as houses of refuge, reform schools, and industrial schools by the 1870s, a child convicted of a serious offense could still be sent to prison.

In 1899, Cook County, Illinois (Chicago and its suburbs), established the first-known juvenile court to assist "dependent, neglected, and delinquent children." The concept involved the use of a trial judge who was separate from judges for adults, the maintenance of separate records for children, and the authority of a judge to order placement of a child into an appropriate facility designed only for children. For children who were delinquent, the focus of the court was on the best interests of the child and how the child could be "treated" as opposed to punished. These principles were soon adopted by most states throughout the nation and have generally been recognized as important factors guiding reform in the area of criminal justice.

Current Model

Juvenile justice systems in states throughout the country have taken the basic concept developed at the turn of the century and have constructed a very elaborate system, which normally comprises several components:

—Confidentiality. Recognizing that young people can be permanently stigmatized by their mistakes, juvenile courts traditionally keep records and proceedings confidential; they are not open to the public. The names of the individuals charged in the juvenile court are not publicly reported.

—Due Process. The proceedings in juvenile court are now more formalized than was the case 40 years ago—adequate notice, proof beyond a reasonable doubt, and right to counsel are standard. In a series of cases in the 1960s, the U.S. Supreme Court recognized certain due process rights for juveniles.

—*In re Gault*, 387 U.S. 1 (1967). This case involved a 15-year-old youth with a prior record of probation for theft. When he was picked up again for indecent phone calls, the judge in an informal hearing found him delinquent and sent him to industrial school. *Gault* recognized that before a youth such as 15-year-old Gerald Gault could be sent to an institution, he had a right to protection against self-incrimination, a right to notice of charges, a right to counsel, and a right to question witnesses. Similarly, in *In re Winship*, 397 U.S. 358 (1970), the U.S. Supreme Court held that the "reasonable doubt" standard applies in all delinquency proceedings.

—Placements. Rather than just sending young people to "reform schools," most states have arranged a system of options for the placement of a youth found delinquent. Thus, in addition to probation and probation-related programs in which the youth can live at home, the youth can be placed in a community program in which his or her residence is required, in a secure facility outside of the community, or in a secure detention facility. In recent years, specialized programs, which include boot camps, vocation training, and community service, have been developed. The length of time in a program or placement usually depends

Stuart O. Simms is secretary of Maryland's Department of Juvenile Justice in Baltimore. He is a fellow of the American Bar Foundation, a member of the ABA Criminal Justice Section Council and its Race and Racism Committee, and a member of the ABA Task Force on Criminal Justice Standards—Jury Trial and Discovery and the ABA Task Force on Minorities and the Criminal Justice System, as well as a member of numerous bar associations.

upon the specifications of the program or upon the order of the judge.

—Sending Young People to Adult Court. All states have some type of provision for sending young people to adult criminal court based on the idea that certain young people who commit certain crimes are so violent that they cannot be "treated" in the juvenile justice system. In a process sometimes referred to as "waiver," certain cases are transferred to adult court.

Current Challenge

Currently, there is public debate to significantly alter or abolish juvenile justice concepts. The debate is fueled by significant increases in arrest rates for violent juvenile crime. In particular, arrest rates for homicides by young people, ages 14 to 17, have more than tripled since the late 1980s, and juvenile arrest rates for weapons law violations have nearly doubled between 1987 and 1994 (Snyder et al 1996). Far more disturbing to some were the projections made by the federal government and several criminologists that with the projected increase in the teenage population, violent crime arrests of juveniles could increase by 22 percent between 1992 and 2010. There are others who argue that the clear majority of violent crimes, 86 percent in 1994, are committed by adults, and adults are responsible for three-fourths of the increase in violent crimes.

The debate about changing the current juvenile justice system is occurring at a time when the country is recording a surge in the use of marijuana by young people. After several years of a slight decline in marijuana use by young people of high school age, the report of the recent increase was alarming to the presidential candidates in the last election, to legislators, to educators, and to the public at large.

Finally, the continuing emergence of gangs and the frequent involvement of young people in violent crimes, especially highly publicized murder cases, have increased the public concern for strong, immediate action to curb youth violence.

Current Proposals

A number of states have considered or are considering modifications to the standard juvenile justice model. The types of revisions include

1. Removing Confidentiality. Several states have begun to open up juvenile court records and proceedings to increase public awareness of the juvenile justice system.

2. Reduced Age of Adult Jurisdiction. As a means of stiffening society's resolve against violent crime, some states are enacting provisions requiring that any child 14 years old or older who is charged with murder be charged as an adult. These mandatory "waiver" statutes are also being examined in connection with drug, weapon, and sex offenses.

3. Hybrid System. Several states, such as Minnesota, have enacted statutes that enable them to sentence certain young people to a term in a juvenile justice program with an overlapping adult criminal sentence to run concurrent or consecutive to the juvenile term. The adult term would be triggered by the court's order or by some act or omission by the youth.

The future of the juvenile justice system is still a matter of debate. The recent changes in state juvenile justice systems have occurred so rapidly that there is no data to determine whether the changes reduce crime or juvenile delinquency. One of the critical factors that may influence future policy is cost. Currently, most secure juvenile facilities are filled beyond capacity, and states are searching for less costly options. The critical debate on juvenile justice policy is going to require a thorough analysis of programs, data, and statutes. Whether the nation is willing to go through such an analysis and debate is the largest unknown.

Vocabulary You may wish to discuss the following terms with students to help them better understand issues and concepts presented in the articles.

aggravating circumstances
appeals
community policing
concurrent
confidentiality
consecutive
conspirator
contraband
corrections
due process
exclusionary rule
felony
habeas corpus
initiative
Miranda warnings
misdemeanor
obstruction of justice
parole
praying a jury
probable cause
probation
prosecution
recidivism
search and seizure
sequester
victim
voir dire

Resources

America's Children at Risk. American Bar Association, 1993.

Greenwood, Peter, et al. "Diverting Children from a Life of Crime, Measuring Costs and Benefits." RAND Corporation, 1996.

Snyder, Howard, Melissa Sickmand, and Eileen Poe-Yamagata. *Juvenile Offenders and Victims: 1996 Update on Violence*, 1996. ◆

Teaching Strategy

Juveniles and the Law

Gayle Mertz

Update on Law-Related Education, 21.2, 1997, pp. 9–10. © 1997 American Bar Association

Background

The juvenile justice system was founded to protect the identity and rights of juvenile offenders, to prevent early mistakes from marring the records of young people, and to help young offenders reform their behavior. Americans are wrestling with the questions of how to decrease violent juvenile crime, how to hold juveniles accountable for their acts, and how to improve the juvenile justice system as a whole, at the same time protecting the rights of juveniles.

Objectives

As a result of this lesson, students will

- Identify goals of the juvenile justice system
- Express opinions about the effectiveness of the system
- Analyze proposals for changing the system
- Determine how the system should handle offenders described in three case studies
- Offer recommendations for retaining or changing the present system

Target Group: Secondary
Time Needed: 2–3 class periods
Materials Needed: article "Juvenile Justice System: At the Crossroads," Student Handout

Gayle Mertz is director of the Law-Related Education Network in Boulder, Colorado. She also serves on the American Bar Association Commission on Youth Education for Citizenship and the Update on Law-Related Education Editorial Advisory Board.

Procedures

1. Ask students to gather news stories from newspapers, magazines, or television news programs about crimes allegedly committed by young people.
2. As a class, examine each story to gather information about the age of the offender and the type of crime committed. Have students determine the average age of the offenders and whether the crimes should be categorized as violent. Ask students to discuss what can be done to decrease crime among young people and how youthful offenders should be treated.
3. Distribute copies of the article "Juvenile Justice System: At the Crossroads" to students. Ask them to read the article for the following information: the purpose of the juvenile justice system, the rights of juveniles within the system, the challenges facing the system, and proposals for changing the system.
4. Discuss the article with the class. Then encourage students to express their opinions about the system. Does the system work? Are changes needed? Would proposed changes improve the system? Should the system offer young people expanded rights, such as confidentiality? Should youthful offenders have the same due process rights that adults have? Should young people over a certain age be placed in the adult justice system? Should a juvenile of any age who commits a violent crime be placed in the adult justice system? Is a juvenile justice system necessary? Encourage students to list any changes they think the system needs.
5. Divide the class into groups of three or four students. Distribute a copy of the Student Handout to each group. Suggest that each group select a member to serve as the recorder. The recorder should take notes describing the group's opinions and reasoning. Have group members analyze each situation by answering the following questions.
   - Should the name of each juvenile defendant in each situation be published in the newspaper? How do you justify your answer?
   - Should school officials be notified when one of their students is involved with the juvenile justice system. If so, at what juncture in the process? Explain your opinion.
   - Should juveniles be treated as adults? Explain your reasoning.
   - What do you think the juvenile justice system should do to serve the best interest of each young person?
   - What do you think the juvenile justice system should do to best serve the community?
6. Have each recorder report on his or her group's discussion. Make a master list of opinions on the chalkboard.
7. Poll the class to identify majority opinions and recommendations.
8. Conclude the activity by having students decide whether the juvenile justice system should be changed, and if so, how.

Student Handout

Situation A

Three juveniles, Brooke, Ted, and Scott, were apprehended riding bicycles that did not belong to them. The bicycles had been parked near a public swimming pool. Brooke is a 15-year-old victim of child abuse who has a long record of stealing. Brooke's father is in prison. Her mother works two jobs and is rarely home. Brooke is responsible for caring for her younger brothers. She often misses school and is failing most of her classes.

Ted is also 15 years old. He admitted drinking beer at home before meeting Brooke and stealing the bikes. Ted attends school regularly, is a fair student, and has never been in trouble with the law before. Ted's parents are angry with him for getting into trouble, but they say that the whole incident was Brooke's idea and fault.

Scott, one of Brooke's brothers, is 10 years old. He was with Brooke because she was responsible for watching him while their mother was at work. Scott has a poor record at school, but he has never been in trouble with the law before.

Situation B

Three teens were injured during a fight between rival gang members that took place on a football field behind a high school. Several students identified those involved in the fight. Four teens have been charged.

Christopher, 17, a good student, dropped out of school to find work and help his family after his father was injured in an industrial accident and was unable to work. Many of his friends go to the high school where Christopher hangs out. Although he is on probation for shoplifting, he had never before been charged with a violent crime.

Douglas, 15, is new in town. He has made friends with members of a local gang, but he is not a member of the gang. When the fight broke out, he helped his friends who are gang members. Douglas's family moves frequently from one city to another because of his mother's employment. Douglas has never before been accused of breaking the law.

Most of Jennifer's friends are male gang members. Jennifer, 14, is strong and tough and has the reputation of being a bully in school. At the same time, she is smart and does well in school without really making an effort. Jennifer is constantly in trouble at school, but she has avoided contact with the juvenile justice system. Her concerned parents do not feel that they can control her.

Aaron, now 16, a proud member of a gang, has been in trouble with the law since he was 12. He has served time in juvenile detention and is currently receiving psychological counseling and attending school regularly. Aaron has difficulty controlling his temper. His mother is concerned about his behavior and attends therapy with him. Aaron's father says that a boy needs to learn how to defend himself and he shouldn't ignore it when people hassle him.

Situation C

Two teens were injured by gunfire when a shooting match broke out between rival gang members. Three teens were later picked up by the police and charged with attempted murder. Guns were found in the trunk of the car they were driving. They told police that they were only defending themselves and did not fire their guns until after they were shot at. Witnesses confirm their stories.

Michael, 17, lives in a very rough neighborhood. His parents keep guns in their home as do most people in the neighborhood. Michael's parents work hard and devote as much time to their children as their busy schedules allow. Michael has friends who are gang members, but he does not belong to the gang. When Michael and his friends go out on weekends, they usually take their parents' guns. They say the guns are for protection. On this particular Saturday night, they were shot at as they drove past rival gang members. They circled around the block and returned the fire. One of Michael's friends and a member of the rival gang were injured. It is not known who was shot by whom.

Sixteen-year-old Jeff and his family are homeless. Although his father works full time, he does not make enough money to provide housing for the family. The family sleeps in shelters or in the car. Jeff is a good student, but he is a member of a gang and is considered a leader by the other 12 members. Gang membership gives Jeff a sense of belonging. He has a juvenile record for theft and aggravated assault.

Rafael, 17, comes from a stable home. His father works and his mother is home all day. Rafael is the oldest of five children. This is the first time he has ever been in trouble at school or with the law. Rafael recently started experimenting with drugs and associating with a new group of friends. His parents don't approve of his friends or his drug use. Rafael admits that he was in the car when guns were fired but denies that he played any active role in the gunfire.

Drugs: The Unstated Draconian Costs

Awesome penalties for youthful offenders involved in drug activity

Stuart H. Deming

Update on Law-Related Education, 21.2, 1997, pp. 11–12. © 1997 American Bar Association.

In junior and senior high schools all over the United States, students have become acquainted with drugs through other students. Often these other students are viewed as the "in" crowd. Many of today's parents were also exposed to the pressures of drug use. At one time, they may have thought that the occasional use of marijuana was not psychologically addictive and would not lead to the use of progressively more destructive drugs. Anyone suggesting that there were dangers associated with the use of drugs was shrugged off—"they really didn't understand."

Through friends' and possibly their own experiences, most parents learned how all too often a rather innocent experimentation with marijuana led to a lifestyle of progressively destructive behavior, whether in the form of addiction or psychological dependence on drugs or alcohol. But regardless of one's views on the use of drugs, what is often overlooked today is the rather striking changes in the law over the past 20 years. Relatively minor drug activity can lead to draconian costs in the criminal justice system.

The most notable change is that associated with federal sentencing guidelines. Out of concern for what was viewed as grossly disparate sentences, Congress passed legislation that led to the federal sentencing guidelines. The guidelines provide that for any given crime, a convicted defendant in any part of the country should receive the same sentence from any judge. Now, a judge looks at a defendant's criminal history and the characteristics of the crime committed. Seldom can the uniqueness of the situation or the good qualities associated with a defendant be taken into consideration. Getting off without punishment or with a slap on the wrist is no longer likely.

Guidelines

Typically, a judge can look only to the type of drug, the quantity of the drug, and the criminal history of the convicted person in imposing a sentence. Whether a defendant is a good student or has a family that is dependent upon him or her is not relevant. Nor can financial status, family background, or past or expected contributions to the community be a factor in sentencing. It is now a relatively cold mathematical process. This is in direct contrast to the past when a whole range of factors could be taken into account.

Still another change in the sentencing law in federal court is what is often referred to as "truth in sentencing." In the past, someone convicted of a crime was expected to serve one-third of his or her sentence. For example, a person sentenced to 10 years in prison would serve about three and one-third years. Today, a 10-year sentence in federal court means much more like 10 years of incarceration. And many states have effected similar changes in their sentencing guidelines.

These changes have a dramatic impact on young people. Most young people think that the tough sentencing laws are limited to violent criminals. "Three strikes and you're out" became a popular political slogan in recent years. Clearly, a young person seldom has a violent crime on his or her record, much less three. But many young people are overlooking or may not know about the tightening of sentencing for drug law infractions.

At present, giving a small amount of marijuana to a friend could lead to a

Stuart H. Deming is a partner with the law firm of Inman Deming, L.L.P., with offices in Washington, D.C., and Kalamazoo, Michigan. He previously served in various capacities as a federal prosecutor with the Department of Justice and the U.S. Securities and Exchange Commission. He is the co-chair of the Section of International Law and Practice's Task Force on International Standards for Corrupt Practices and secretary of the International Law and Practice's Task Force on War Crimes in the Former Yugoslavia. He previously served as the chair for the Section of International Law and Practice's Committee on International Criminal Law.

substantial sentence. Indeed, having a tiny amount of crack cocaine may lead to a lengthy amount of prison time. For example, depending upon the circumstances, having one gram of crack may lead to 30 months of imprisonment under federal law. Having 35 grams may get a person 10 years.

There has been a public debate as to whether the sentencing guidelines are particularly unfair with respect to the African-American community, in which crack is most often used. The sentencing for a similar amount of noncrack cocaine, which is more prevalent in other segments of society, is not as stiff. While some believe that the penalties for crack should be reduced to the same levels as those for cocaine, both the Clinton administration and Congress have opposed changes that would reduce prison time for possession of crack. Any change in the guidelines would more likely make sentencing for cocaine possession on a par with that for crack possession.

In addition to the toughening of sentences for drugs, courts have shifted how they treat law enforcement practices associated with the distribution and sale of drugs. No money needs to be involved. A person can simply pass a drug to someone else, and he or she may be charged with a drug transaction.

But a person doesn't even have to give someone else a drug to be charged with a drug offense. A person can be charged as a co-conspirator without having distributed any drugs, received any drugs, or taken any affirmative action on behalf of a conspiracy. To be a co-conspirator in a drug case, one only has to be a knowing participant in the conspiracy. A conspiracy exists when two or more persons agree to violate federal law, and conspirators are willing and voluntary members, intending at least one of the objects of the conspiracy. Normally, there is a requirement that one of the participants take an affirmative step to further the conspiracy. Typically, examples of steps that might be taken to indicate that the conspiracy is more than talk are making a telephone call or renting a car. Unlike with other crimes, however, no such overt act to further the conspiracy is needed when drugs are involved.

An individual could be put in jail for 20 to 30 years with no actual use or distribution of an illegal drug.

It takes very little to be charged and convicted of a drug conspiracy. The amount for which a defendant is responsible under the sentencing guidelines is the amount that could have been reasonably foreseen. An individual could be put in jail for 20 to 30 years with no actual use or distribution of an illegal drug. Even passing on information concerning a possible sale or taking a call from a buyer and passing the message on to someone else could result in doing time.

Courts' Response

The courts have also supported a tougher approach to illegal drug transactions. In the 1970s, Congress repealed what was known as the "no-knock" statute. Before its adoption, the law required law enforcement officials to knock on a drug suspect's door before entering—in keeping with the Fourth Amendment's prohibition on unreasonable searches and seizures.

The no-knock legislation was adopted by the Nixon administration in its war on drugs. By allowing law enforcement officials to avoid knocking and announcing their presence, the government expected that the police would be safer, and drug traffickers would not have time to dispose of drugs before the police entered. While Congress later relented and repealed the no-knock statute, the courts over the past 10 years have, as a practical matter, reinstated it. At present, law enforcement agents may enter a premises within seconds of knocking—without waiting for someone to admit them.

... federal agents have increased freedom to make promises to suspects that they do not have to keep.

At the same time, federal agents have increased freedom to make promises to suspects that they do not have to keep. When it is an agent, rather than a prosecutor, who offers a lighter sentence in return for cooperation, the courts are prone to disregard the promise on the basis that the agent had no authority to make it. Only a prosecutor has the requisite authority to make such deals.

Also, the use of criminal forfeiture laws in drug cases has been dramatically expanded to further erode the Fourth Amendment's seizure restrictions. Regardless of whether there is a conviction or even culpability of the owner of a property, the government can seize property used in drug trafficking. If, for example, a student uses his or her father's car to distribute marijuana, the government can take the car even if the student is never convicted of the drug-related crime.

All of the foregoing are demonstrative of the changes in the law—and its interpretation—that have taken place over the past 20 years. All branches of government have become tougher on pursuing drug activity. Twenty years ago, a judge might have simply given a strong lecture to a young person convicted of drug activity or might have ordered him or her to perform community service. That possibility no longer exists. Today, young persons must be well aware of the awesome legal consequences associated with questionable drug activity. ♦

Maintaining Order—and the Rights of Citizens

Law enforcement's complex web of federal, state, local, and private agencies

John S. Farrell

Update on Law-Related Education, 21.2, 1997, pp. 13–17. © 1997 American Bar Association.

Law enforcement in the United States is a complex association of federal, state, local, and private enforcement agencies. The average American may have contact only with the local police or sheriff and may have a limited knowledge of the scope and operation of the larger state and federal agencies. Yet, thousands of specialized military, campus, transit, and park police agencies and private security firms have employees who are licensed to carry weapons and make arrests.

Our diverse system of law enforcement is a direct result of our constitutionally guaranteed right for separate and sovereign state governments.

Our diverse system of law enforcement is a direct result of our constitutionally guaranteed right for separate and sovereign state governments. The concern for ensuring basic rights to all persons was a major issue for the authors of the United States Constitution. The fear of unrestricted police powers, like those associated with the English monarchy, gave particular importance to the rights of people accused of crimes. The Bill of Rights and the decentralized framework for the American system of criminal justice were designed to prevent potential abuses. The rights of the accused were to be preserved even when they were contrary to the will of the majority.

In 1993, there were over 17,000 state and local law enforcement agencies in the United States that were employing over 800,000 full-time sworn officers and civilian men and women, according to the Bureau of Justice Statistics (BJS). What makes each of these agencies unique is the extent of each agency's authority; that is, the laws each is empowered to enforce and its jurisdictional boundaries.

Federal Law Enforcement

The U.S. Constitution is limited with respect to federal responsibility for criminal jurisdiction. With the exception of law enforcement of the crimes of treason and counterfeiting, policing was left to the states. Further state delegation of police protection responsibilities to local governments was also evidence of the apparent fear of centralized law enforcement. However, beginning in the Reconstruction period and continuing today, the federal government has had an increasing role in criminal justice with thousands of acts now defined as federal crimes.

There are currently more than 50 federal law enforcement agencies. Some agencies are well-known. These include the Federal Bureau of Investigation (FBI), the Drug Enforcement Administration (DEA), the Bureau of Alcohol, Tobacco and Firearms (BATF), and the United States Secret Service. These agencies have jurisdiction over offenses with interstate and international natures. Federal agents and officers are authorized to make arrests in any state or United States territory for crimes violating federal laws, such as transportation of illegal aliens, treason, espionage, counterfeiting, interstate flight to avoid prosecution, bank robbery, and kidnapping. Of course, cooperation between federal, state, and local law enforcement is essential. For example, in the case of a robbery of an FDIC-insured bank, the state, county, or local police would respond initially, make arrests if the suspects were still present, secure the scene, and then turn the investigation over to the FBI. Or, in a case in which suspects have crossed state lines after committing a crime, the local police would enlist FBI help in tracking and capturing the suspects. It is not unusual, and often highly advantageous, for federal, state, and local law enforcement agencies to cooperate during a

John S. Farrell is the chief of police for Prince George's County, Maryland, and a member of the American Bar Association's Criminal Justice Section.

large-scale criminal investigation. This cooperation is accomplished through the use of mutual assistance agreements, multijurisdictional aid compacts, joint task forces, and strategic operations. By combining the various agencies' information and investigative resources, law enforcers can address specific criminal activities more effectively and efficiently.

State Law Enforcement

Guaranteed the right to govern themselves by the United States Constitution, the states could establish their own law enforcement agencies. With the exception of Hawaii, all of the states have done so usually in the form of a state police force. Generally, state police agencies are responsible for traffic enforcement on state roads and interstate highways. They may form specialized task forces to target drunk or "aggressive" drivers. They may conduct drug "interdictions," targeting individuals who use the highways for transporting illegal drugs. State police agencies often maintain and operate Medivac helicopter units to transport seriously ill or injured victims to medical facilities. In many jurisdictions, the state police have criminal investigative and forensic services divisions, and they often assist smaller police agencies that lack investigative or forensic capabilities. For those states with large rural populations, the state police may be the main law enforcement agency that provides assistance in a time of crisis.

Local Law Enforcement

Of the over 17,000 law enforcement agencies in the United States, at least 12,000 are local (county, city, and town) agencies. Each jurisdiction enforces its own applicable state and local laws and ordinances and provides residents with protection and other emergency services.

Local law enforcement is the first "line of defense" in many communities. Traditionally, the primary mission of local law enforcement agencies is to enforce the law by applying legal sanctions—usually arrest—to behavior that violates a legal standard, taking the necessary steps to control events and circumstances that disturb or threaten to disturb the peace, and gathering information. Local police provide a broad range of service-related duties, including assisting injured persons or responding to fire calls. Other functions may include crime prevention and education activities and, since the early 1990s, implementing "problem-solving" or "community-oriented" policing styles and strategies.

Police-Power Limitations

The idea that the will of the majority is secondary to the protection of individual rights is extremely important in our system of criminal justice. Some would argue that the police could be more effective in controlling certain crimes if more emphasis was placed on enforcement rather than on the time-consuming investigations generally associated with the scrupulous observance of individual rights. However, most people would agree that policing must be influenced by and be accountable to the people and that it must conform to the constitutional system of governmental checks and balances.

Our system of government provides many safeguards that help prevent abuses by law enforcement agencies. These include the Bill of Rights; decisions of the Supreme Court that become the "law of the land"; and numerous federal, state, and local laws that guarantee fair treatment. Additionally, state constitutions and court decisions, local charters and ordinances, and written departmental rules and procedures provide guidance and oversight for law enforcement agencies. These safeguards limit the ability of law enforcement to intrude into individual rights, such as unreasonable search and seizure; provide everyone with the right to legal counsel; and restrict the use of deadly force.

These safeguards limit the ability of law enforcement to intrude into individual rights ...

In recent years, some jurisdictions have initiated citizen oversight panels to monitor the behavior of law enforcement agencies. These panels review the findings of certain police internal investigations or, in some cases, conduct investigations on their own. Citizen oversight panels can be valuable tools that help maintain the community's trust in its police department by ensuring that a department conducts fair and impartial investigations into alleged misconduct, especially in cases of excessive force.

Supreme Court Decisions

The 1960s were a decade of change and upheaval in the United States. Civil disorder, social reform, and an escalating crime rate had a significant impact on the Supreme Court decisions that were rendered during that decade. Three decades later, it is difficult to measure what, if any, impact the Court's decisions during the 1960s have had on criminal activities; however, there is little doubt that they had a significant impact on the entire criminal justice system. Some law enforcement officials would argue that the decisions of the 1960s have allowed individual rights, especially of the accused, to take precedence over the rights of victims and the safety of society as a whole.

Several Supreme Court decisions of the 1960s radically changed the ways in which the police could conduct searches and seizures or question suspects.

—*Mapp v. Ohio*, 367 U.S. 643 (1961), banned the use of illegally seized evidence in state criminal cases by applying the United States Constitution's

Fourth Amendment guarantee against unreasonable search and seizure to the states.

—*Gideon v. Wainwright*, 372 U.S. 335 (1963), required that legal counsel be appointed for all poor defendants in all felony criminal cases.

—*Miranda. v. Arizona*, 384 U.S. 436 (1966), perhaps the most publicized of all the 1960s decisions, required police officers, before questioning suspects, to inform them of their right to remain silent, their right to hire an attorney, and their right to have an attorney appointed for them if they cannot afford to hire one. Although a suspect may knowingly waive these rights, the police cannot question anyone, who, at any point, asks for a lawyer or indicates "in any manner" that he or she does not wish to be questioned.

—*Katz v. U.S.*, 389 U.S. 347 (1967), declared that the Fourth Amendment protects people and places. A defendant must demonstrate an expectation of privacy, and that expectation of privacy must be reasonable.

The Fourth Amendment to the Constitution does not prohibit search and seizure; rather, it prohibits *unreasonable* search and seizure and also requires that any warrant that is issued must be based on "probable cause." *Probable cause* can be simply defined as "a set of facts that would indicate to a *reasonable* person that a crime is being committed or has been committed." There are several exceptions when a police officer may conduct a search and seizure without first obtaining a warrant. A few of the more notable exceptions are

—An officer may conduct a *Stop and Frisk*, named after the *Terry v. Ohio*, 392 U.S. 1 (1968), decision that upheld an officer's right to stop a suspect based on "reasonable or articulable suspicion" and to conduct a limited search or "frisk" (pat-down) of the suspect for weapons. The "reasonable or articulable suspicion" may be an officer's own visual observation or other information that leads to the belief that the individual is engaged in criminal activity. This right to conduct a limited protective "frisk" has been extended to include a vehicle that is occupied by a suspect.

—*The Plain View Doctrine* allows an officer who has a legal right to be at a location to seize any items that are in plain view if he or she knows that the items are contraband (illegal) or evidence of a crime.

—*Abandoned Property* refers to property that someone has thrown away or abandoned. When a person abandons or throws away something, he or she does not have a constitutionally protected expectation of privacy in that property.

—*The Motor Vehicle Exception* provides that because motor vehicles and any property inside the vehicle can be driven away or otherwise moved, a warrant is not needed to search a motor vehicle if an officer has probable cause to believe that there is evidence or contraband in the vehicle.

—*Hot Pursuit of a Fleeing Felon* means that if the police are chasing a person who has just committed a felony and the suspect runs into his or her house to hide, the police would usually be able to enter the house, search for the suspect, and arrest him or her without a warrant.

In general, the police are expected to enforce the law by using verbal advice, warning, persuasion, or physical force.

Use of Nonlethal Force

In general, the police are expected to enforce the law by using verbal advice, warning, persuasion, or physical force. "Reasonable" physical force may be used when other alternatives have been exhausted or would clearly be ineffective under the particular circumstances. Officers are permitted to use whatever force is reasonable and necessary to protect themselves and other people from bodily harm. Officers are not allowed to use more force than that which is necessary to achieve a lawful purpose. Police officers may not forcefully strike any person except to defend themselves or others. Reasonable nondeadly force may include the use of an impact weapon, such as a baton, or a chemical weapon, such as tear gas.

Police officers who are found to have used more force than was necessary to make an arrest or to control a situation are subject to the same consequences as any other citizen. Officers may be arrested and prosecuted in a criminal court for assault and battery, prosecuted in federal court for a violation of civil rights (Title 18 United States Code), or sued for damages in a civil court. Additionally, police agencies conduct their own internal investigations into allegations of excessive force. The punishment for an officer who uses excessive force is severe and may include termination.

Use of Lethal Force

Lethal, or deadly, force, such as the discharge of a firearm, may not be used when less force will control the situation. Officers may use deadly force only when they have a reasonable belief that the suspect poses an *immediate threat of death or serious injury* to the officers or other persons. An officer should give verbal warning before using deadly force whenever possible. Only facts or information known to the officer at the time of the decision to use deadly force can justify the decision. Facts unknown to the officer, no matter how compelling, cannot be considered in subsequent investigations, reviews, or hearings. For instance, a police officer who uses deadly force and later discovers that the suspect was wanted for murder in all 50 states cannot use that information to justify his or her use of deadly force.

In 1985, the Supreme Court rendered an important decision regarding the use of deadly force. In *Tennessee v. Garner*, 475 U.S. 1 (1985), the court upheld a decision of the Tennessee Court of Appeals that stated that the killing of a fleeing suspect is a "seizure" under the Fourth Amendment, and the use of deadly force to prevent the escape of *all* felony suspects is constitutionally unacceptable. Officers may not use deadly force to apprehend a fleeing suspect unless they have probable cause to believe that the suspect has committed a felony and, further, poses an immediate and significant threat to the safety of an officer or is a danger to the community.

To better prepare their police officers for the possibility of having to use deadly force, many police departments have supplemented their traditional firearms training with some type of "judgmental shooting training." Using live-action scenarios, computer-generated interactive video, or both, judgmental shooting training allows officers to experience the various emotions and stresses that are present during deadly force confrontations. While every potentially deadly force encounter is unique, officers are able to observe firsthand in a controlled training environment what their reactions are to such potentially deadly confrontations.

While specifically designed to increase an officer's chances of survival on the streets, judgmental shooting training is also an excellent tool for demonstrating to the public some of the situations that law enforcement officers encounter every day. Many police agencies conduct regular sessions in judgmental shooting for the media, judges, attorneys, and citizen groups.

Community Involvement

The most effective way to ensure that the police do not overly intrude on the rights of citizens is to involve citizens in the law enforcement process. When citizens are well-informed, have a thorough knowledge of how the system works, and have a say in how their police department functions, trust and cooperation increase. With the presence of trust and cooperation, the community is less likely to be suspicious and overly accusatory of police practices. Ironically, the thoughts expressed over 30 years ago by President Lyndon Johnson are still relevant in 1996. In a message to Congress, President Johnson said, "Law enforcement cannot succeed without the sustained and informed interest of all citizens. ... The people will get observance of the law and enforcement of the law if they want it, insist on it, and participate in it."

The most effective way to ensure that the police do not overly intrude on the rights of citizens is to involve citizens in the law enforcement process.

The intensive research of the 1970s into how the police could better serve the public indicated that in many jurisdictions police personnel resources were not being used effectively. The most significant of these findings demonstrated that random patrols did not necessarily reduce crime; neither did they bring the police closer to the public, nor did they eliminate fear of crime. However, it was noted that the use of foot patrols in a community frequently reduced both the fear of crime and actual criminal activity. The conclusions obtained from this research eventually became the catalyst for a new concept in law enforcement: community-oriented policing. Direct community involvement and an attempt to solve the underlying problems that cause crime are the essence of this law enforcement philosophy. Spurred by the availability of federal grants in the late 1980s and early 1990s, community policing has expanded tremendously. Thousands of police departments now employ some, if not all, of the concepts of community policing. While some police departments have converted their entire agency to the community policing model, most have taken the basic tenets of community policing and put them into action to fit their departments' individual needs.

Both law enforcement professionals and the public will closely scrutinize the effectiveness of community-oriented policing. The concept's greatest value may be one that appears most difficult to measure—its ability to bring the police and the community together; to build trust between the two; and to facilitate frequent, open communication.

Prince George's County Experience

In 1991, the Prince George's County, Maryland, Police Department began its community policing program. The program is firmly based on the belief that without the cooperation and assistance of the community, law enforcement will not effectively reduce crime. We have adopted a philosophy that recognizes the need to develop a new relationship with the overwhelmingly law-abiding people in the community. We have given our citizens an active role in setting local police priorities and have involved them in programs designed to improve the quality of life in their neighborhoods. Citizen advisory councils have been established in all police districts to better understand the needs of our citizens. For example, we believe that the positive outcomes achieved by two of our most successful initiatives, which were designed to eradicate street-level drug dealing and violent crime, were due in large part to the effective input of our citizens. They told us their needs and suggested what direction these operations should take.

In the past five years, community policing has grown from six officers assigned to one police district to over 120 officers assigned countywide. These officers have been freed from the isolation of the patrol car and now have daily opportunities to interact with people face to face. Community policing officers are an important part of the department's outreach effort. They serve as the citizen's link to the various public and private agencies that can address a broad array of community concerns. For instance, a neighborhood may have a problem with vacant, dilapidated buildings that are attracting vagrants and criminal activity, but the people in the neighborhood may not know who to call for relief. The community policing officer can relay this concern to the proper government agency and arrange to have the problem solved.

Each district commander adapts the basic community policing philosophy to meet the needs of his or her individual district. For example, community policing bicycle patrols have been very useful in some of the more densely populated areas. Community policing crime prevention seminars have been organized to reach out to the various groups that represent our community, including the Apartment and Office Building Association, the Southern Management Corporation, the Southland Corporation, the Asian-Pacific Community/Business Owners, and the Chamber of Commerce.

In the past, some officers and citizens regarded community policing as basically a "feel good" program with little potential for reducing crime. However, through extensive planning and involvement of many segments of the police and community, that perception has significantly changed. We now use community policing enforcement teams to target high crime areas for special enforcement efforts. These teams receive additional training on how to conduct investigative stops within acceptable constitutional guidelines. As with all of our officers, they are encouraged to use tact and courtesy. We operate on the premise that consistent and reasonable order maintenance will negate much of the "anything goes" mentality that is often associated with open-air drug markets and prostitution that can significantly detract from our quality of life.

Conclusion

All citizens have a right to live free from the fear that they will be victims of crime. To the best of their ability, federal, state, and local law enforcement officers attempt to safeguard citizens' rights and maintain order. Nevertheless, order must be maintained in a manner that does not diminish the individual rights of any citizen. Interpretations of the United States Constitution by our courts have resulted in rules that place limitations on the tactics that law enforcement agencies may employ as they enforce the law. While these rules may sometimes seem exceedingly restrictive, they uphold the basic freedoms from unlawful arrest, search, and detention that were so important to the leaders of the young American republic.

To the best of their ability, federal, state, and local law enforcement officers attempt to safeguard citizens' rights and maintain order.

If we are to be successful in reducing crime, citizens must become involved in the business of policing communities. Nationwide, approximately 500,000 police officers are working for agencies that have limited tax-driven resources. In these same communities live approximately 275 million people. We must encourage those 275 million sets of eyes and ears to share with the police what is really happening in the neighborhoods. Without a solid partnership with their citizens, the police will continue to be restricted for the most part to answering "calls for service" and reacting after the fact to crime. With willing community involvement, they can make streets safer and truly improve the quality of life for all people.

Resources

Bureau of Justice Statistics. *Report to the Nation on Crime and Justice*, 2nd ed. Washington, D.C.: U.S. Department of Justice, 1995, 62–63.

———. *Local Police Departments, 1993*. Washington, D.C.: U.S. Department of Justice, 1994.

Farrell, John S. *Fourth Amendment—Warrantless Search and Seizure—Recent Trends*. Metro-Dade Police, September 1992.

Prince George's County Police Department. *General Order Manual*, Sections 1/104 BS 3/901.10. Planning and Research Division, 1995.

———. *Search and Seizure Training Manual*. Training and Education Division.

Swanson, C. R., L. Territo, and R. W. Taylor. *Police Administration: Structures, Processes, and Behavior*, 2nd ed. New York: Macmillan, 1988.

Sweatman, Beverly, and Adron Cross. "The Police in the United States," C. J. International, reprinted in annual editions, 1989. ♦

Get the Facts

A new handbook presenting the latest statistics on the American criminal justice system is available from the ABA. It includes charts and graphs, which are provided on a disk that accompanies the book. Call or E-mail to reserve your copy.

Chris Tozer (312) 988-6128
ctozer@staff.abanet.org

Your Rights as an Accused

The right to say no and to ask for an attorney

Bruce Lyons and John P. Page

Update on Law-Related Education, 21.2, 1997, pp. 18–21. © 1997 American Bar Association.

If you are ever accused of a crime or under investigation, you must understand how to exercise your rights to be sure that you get the best protection under our laws. As an accused, you have the right to say no and to ask for an attorney. Of course, you should try to understand your rights in detail, but there is *no* safe way to give up your rights without the advice of an attorney. This article is not legal advice. It informs you of your rights. You should understand these rights. Then you can understand why the American system of justice protects those rights regardless of how great the cost may be.

Most people think they are safe until the famous *Miranda* warnings have been read to them. Wrong. Anything you say to anyone can probably be used against you. When a law enforcement officer warns you or asks you to agree to something, think about your rights. If an officer asks you to agree or consent to something, you can say no. You have the right to an attorney at any time, even before the *Miranda* warnings are given. The exercise of the right to an attorney is your best protection because once your request is made, officers may not question you unless the attorney is present. That protects you from other mistakes as to the exercise of your rights.

These comments are not meant as a criticism of law enforcement officers, but they are a warning that the police have different responsibilities than you. Officers work according to laws and rules that are intended to serve the general interests of society—including your rights. It is their first duty to investigate and apprehend all wrongdoers. In their investigations, they are required to respect your rights only in certain specific ways. Ordinarily, that means they will ask your permission, agreement, or waiver. Beyond that, they may become your adversaries. When they investigate, they are not required to give you advice or protect you. Because it is important to society that criminals are caught, in some instances the officers may not be required to tell you the truth or may be permitted to use tricks to get the necessary information.

Just as it is an officer's duty to get information, it is your duty to protect yourself. That is why you must be especially cautious about the reasons an officer suggests to persuade you to give up a right. When a law enforcement officer asks you to give your permission, to give your consent, or to waive a right, you are being asked to bargain away, to give up, something very valuable. Usually it's a bad deal. You will get very little of value in exchange for abandoning your rights. The big problem is that you may not be in a good position to weigh those values. The officer may say that cooperation will be better for you or that his or her request is routine, or he or she may give some other reason why you should abandon your rights. It is likely that those reasons won't be entirely true. It is almost certain that you are not qualified to make the decision—especially when you are under the stress of a confrontation with an officer. Your self-protection rule should be, "When you don't know what to say, don't say anything."

This does not mean that you should be uncooperative or that you should refuse to talk at all. You must always be willing to identify yourself and provide such things as your driver's license and vehicle registration. You should also give general information, but only if it does not connect you with a crime in any way. You must never physically resist any officer, unless you believe you are in grave danger of personal injury (very rare). You should not physically resist any search, but you should make it very clear that you do not consent to it. That includes not resisting if an officer wants to "pat you down" for concealed weapons. Above all, do not try to evade, lie to, argue with, or outwit an officer. If you think the truth may be

Bruce Lyons is a criminal defense lawyer in private practice in Fort Lauderdale, Florida. He is a past president of the National Association of Criminal Defense Lawyers and serves as a member of the Criminal Justice Council of the American Bar Association Section of Criminal Justice. John P. Page has a solo practice in Fort Lauderdale, Florida, specializing in criminal pretrial matters.

damaging to you, you should keep quiet until you talk to an attorney.

By doing anything else, there is a danger that you will raise the officer's suspicions and actually give up rights that might have protected you. An example of a foolish attempt to outwit an officer is the person who is stopped by police for any reason and denies the ownership of property that contains contraband. Then the person learns, to his or her regret, that such a denial has the effect of allowing the officer to search the "abandoned" property. Later, the officer can easily prove that the property belonged to the person who was stopped.

There are times when it is proper for you to cooperate in searches. There are times when it is proper to waive your rights. There is never a time when it is safe to decide to give up your rights without the advice of an attorney. Unfortunately, there may be times when you will be forced to decide. That is why you must know your rights.

Sources of Your Rights

As a citizen of the United States and your home state, you are protected by a group of rights that is unique in the world. Every American knows the most basic statement of those rights—that all men are created equal and entitled to life, liberty, and the pursuit of happiness—that's in the Declaration of Independence—and it's not actually law. Most people also know about the Bill of Rights in the Constitution of the United States—but do you know that you are also protected by similar provisions in the constitution of your home state and that those rights under the state constitution may give you even more protection than the United States Constitution?

More importantly, do you know that our understanding of those rights continues to grow daily as our courts apply them to new problems? These changes happen so rapidly that an experienced attorney has to do new research almost every time he or she works on questions that affect your rights. If an attorney can't answer these questions without research, wouldn't you be foolish to put yourself in danger based on your idea of what these rights might be?

Many people believe that the law is a set of rules that can be easily found. In criminal law that is largely true. Crimes are set forth in the statutes of the various government bodies that have authority over us. In contrast, our rights come from several sources. They are the result of the thought, struggle, and sacrifice of men and women over thousands of years. Historically, our laws are derived from the common law developed over hundreds of years in England. You have probably read about the Magna Carta. It contains the most notable expression of individual rights in English law. This is the legal system that the early settlers brought with them to America and that existed when our republic was born. Federal and state constitutions expanded the rights found in the common law, but common law is still important as to our basic rights.

We are a very young country. In the 200 years since these basic rights were expressed, lawmakers and courts have worked to apply them to practical problems. This process goes on in our courts day after day as new questions arise. As a result, many of the rights you probably consider to be basic have been made specific only in the last 40 or 50 years.

Bill of Rights

The first 10 amendments to the federal Constitution are known as the Bill of Rights. Four of them relate to criminal matters.

The Fourth Amendment protects you from unreasonable searches and seizures. Searches of homes or offices, for example, must generally be conducted pursuant to a warrant issued by a judicial officer, which gives the exact place to be searched and the person or things to be seized. It must be supported by a sworn statement that gives the reason (probable cause) for the warrant.

The Fifth Amendment protects you from (1) charges in certain major crimes without the action of a Grand Jury, (2) double jeopardy by a second trial for the same crime, and (3) self-incrimination by testifying against yourself. This is the well-known privilege to "take the fifth." (4) The amendment protects you from the taking of your life, liberty, or property without due process of law. That means that the government must follow each step provided by law.

The Sixth Amendment provides that (1) you are assured a speedy trial so that you cannot be held for years without a trial. (2) You are assured a public trial. (3) You are assured a trial by a jury of "peers," or people from your own area, meaning that you cannot be tried by people from different backgrounds who might have different customs. (4) You are assured of information about the charges against you and the reason they are made so that you can prepare to defend yourself. (5) You are generally assured of face-to-face questioning of the witnesses against you so that you cannot be convicted on the evidence of unidentified witnesses who might be prejudiced against you. (6) You are assured that you can compel the testimony of witnesses on your behalf so that witnesses with favorable evidence cannot avoid testifying because of fear or other reasons. (7) You are assured of the assistance of a lawyer to defend you—at the government's expense for serious crimes—giving you expert help to understand your rights and the laws under which you are charged.

The Eighth Amendment protects you against (1) excessive bail so that you have a right to get out of jail by posting bail. This right would be meaningless if a judge could set an amount that is impossible for you to pay. (2) The amendment also protects

you from cruel and unusual punishments, including punishments of the kind that were inflicted in the infamous witchcraft trials in colonial times.

Today, we think of the Bill of Rights as the basis of our fundamental protections, but it was not always that way. The Bill of Rights was adopted in 1791 after most of the 13 original colonies had adopted their own constitutions. The Bill of Rights was written to give citizens the same protection against the federal government that they already enjoyed against their state governments under their own state constitutions. For 150 years, it remained that way. State protections were defined by state constitutions, and federal protections were defined by the federal Constitution, including the Bill of Rights. The protections of the state constitutions were more important than those of the Bill of Rights because most citizens had more contact with state laws (Crossley 1986). That was particularly true in criminal law because most crimes are governed by state law.

Fourteenth Amendment

Today's system makes the United States Constitution the most important protection in every court in our land. That change began in 1868 following the Civil War when the Fourteenth Amendment was ratified. The Fourteenth Amendment provided (1) that all persons born or naturalized in the United States are citizens of the United States and of the state in which they reside, (2) that no state law could impair the rights of citizens under the federal Constitution, (3) that no state can deprive any person (any *person*, not just citizen) of life, liberty, or property without due process, nor deny any person equal protection of the laws.

Our understanding of the broad effects of the Fourteenth Amendment grew very slowly. The effect on criminal cases is only a small part of the impact of this amendment. The amendment is also the basis of most civil rights legislation and the equal rights movements. Take a moment to think about the overall importance of this amendment. Consider the fact that we chose to extend the equal protection of our laws to every person in our country—not just to our own citizens. That should tell you something about our character as a nation. You may understand why, after years of discussion, the Supreme Court of the United States concluded that the basic reason for extending these protections, and others that came later, is simply that they are necessary in the unique American system of liberty (*Duncan v. Louisiana* 1968). Now let us look at some of the most important rights, which are necessary in our concept of criminal justice.

Expanded Rights

Right to an Attorney. In English common law, the accused ordinarily did not have the right to have the help of an attorney in court. That is why the Sixth Amendment right to the assistance of counsel was understood to mean that you are entitled to hire an attorney who could help you in court. That changed in 1938, when the Supreme Court decided that the right also meant that those who could not afford an attorney have the right to have an attorney paid for by the government. At that time, this ruling applied only to those people accused of federal crimes—a small percentage of all those accused of crime in our nation. The Supreme Court's understanding of the Fourteenth Amendment and of our right to due process had changed by 1963. The court applied the right to serious crimes and said, "Any person who is hauled into court who is too poor to hire a lawyer cannot be assured a fair trial unless counsel is provided for him" (*Gideon v. Wainwright* 1963).

Self-Incrimination. There was a time when an accused was required to give sworn testimony against himself or herself. Because of that, the privilege in the Fifth Amendment was originally thought to protect only the defendant and only against that bad practice. As in other cases, that understanding expanded so that the right now protects the defendant *and* all witnesses in any official government proceeding. Like the right to counsel, this protection of the Fifth Amendment did not apply to the states until a Supreme Court ruling in 1964 (*Malloy v. Hogan* 1964).

Privacy. Originally, the Fourth Amendment rights were applied only to the actions of federal officers. By 1914, the exclusionary rule prevented the federal court use of evidence obtained by government violation of Fourth Amendment rights. Finally, on the 1961 appeal of a woman named Mapp, the Supreme Court of the United States extended this rule and said, "All evidence obtained by searches or seizures in violation of the Constitution is ... inadmissible in a state court." You probably know of cases in which evidence was kept from the jury under this rule. If so, you also know how controversial the rule remains today. The Supreme Court justices anticipated and shared this concern. This concern is highlighted in a frequently quoted passage from the decision:

> There are those who say "[t]he criminal is to go free because the constable blundered." In some cases this will undoubtedly be the result. But "there is another consideration—the imperative of judicial integrity." The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws (*Mapp v. Ohio* 1961).

You may also hear of the "Fruit of the Poisonous Tree" doctrine. This rule of law holds that evidence obtained by use of other evidence that is not admissible under the exclusionary rule is tainted and must also be

excluded. The body of law supporting this rule developed in federal courts before the *Mapp* case and then was applied to state courts after the *Mapp* opinion.

Confessions-Miranda Rights. We have traced the development of the rights that are included in the well-known *Miranda* warnings. You have also been warned that you are in danger *before* the *Miranda* warnings are read to you. That is because these warnings are principally intended to protect against "involuntary" confessions obtained from a defendant by questioning while in custody and deprived of his or her freedom of action. For those specific instances, the Supreme Court required the following measures:

> He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney and that if he cannot afford an attorney, one will be appointed for him prior to any questioning if he so desires. Opportunities to exercise these rights must be afforded him throughout the interrogation. After such warnings have been given and such opportunity afforded him, the individual may knowingly and intelligently waive those rights and agree to answer questions or make a statement (*Miranda v. Arizona* 1966).

Over the years, the Court had adopted various rules designed to prevent confessions obtained by force or means in violation of the accused's rights. At last, the *Miranda* ruling made these protections as clear and definite as possible. However, it applies only to questioning while in custody or questioning in situations in which a reasonable person would not believe that he or she was not free to leave. If you have given up your rights before that, the *Miranda* warnings will come too late.

Each person in this country has unique rights that are very valuable. Remember, the rights are yours just as the risk is yours. That is why you must make the decisions and that is why you must understand your rights. Be respectful of officers. Give reasonable cooperation. Never resist in any physical manner, unless you are in danger of great bodily harm. Most importantly, when you are asked to agree or consent, *you have the right to say no and to ask for an attorney.*

Resources

Crossley, Mary A. "Note, Miranda and the State Constitution: State Courts Take a Stand," *39 Vand. L. Rev.* 1693, 1696 (1986).

Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed. 2d 491 (1968).

Gideon v. Wainwright, 372 U.S. 355, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963).

Malloy v. Hogan, 378 U.S. 2, 84 S.Ct. 1954, 12 L.Ed. 2d 653 (1964).

Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed. 2d 1081 (1961).

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966). ♦

Stop and Think!

A Learning Aid for Students

by Gayle Mertz

Without providing any background information, ask several people if any of the following scenarios would require the person to cooperate with the police officer's request. Record the responses you receive. In fact, none of the people in the scenarios have been accused of any unlawful behavior, and they are all protected by the Fourth and Fifth Amendments. Analyze the responses you received. Did respondents view each situation the same? If not, what do you think influenced them to interpret the rights of one person differently from those of another?

Invite a police officer and/or defense attorney to class to discuss what might happen if the person or persons in each scenario refused to cooperate with the police officer's request.

- An elderly woman is walking home from the grocery store carrying two sacks of groceries. A police officer stops her and asks to look through her bags of groceries.
- Two teen-age boys are walking down a dark street late at night. A police officer stops them and asks where they are going and where they are coming from.
- A police officer rings the doorbell at your house and asks to search the house. She tells you there is a thief loose in the neighborhood and she is searching all homes.
- A police officer stops you as you are leaving school and asks to search your backpack. She tells you the search is routine.
- You have a very large box in your car. A police officer stops you and asks you what is in the box.
- A middle-age person who is professionally dressed has pulled his car off to the side of the road to change a flat tire. A police officer stops to ask what is wrong. The officer politely asks for permission to look in the trunk of the car.
- Two people with dark complexions and hair are at a shopping mall. They are speaking a language other than English. A police officer is suspicious and—using sign language—asks them for identification.

Seeking Justice for the Victim

Victims of crimes, as well as defendants, have legal rights—and they are growing.

Richard T. Andrias

Update on Law-Related Education, 21.2, 1997, pp. 22–23. © 1997 American Bar Association.

Few would wish to see a return to the "hue and cry" justice of feudal England or the justice of self-appointed posses of our own Wild West. Vestiges of private justice still exist in England's magistrate courts and the lowest criminal courts of many of our metropolitan areas. For the most part, however, criminal prosecutions have become depersonalized with professional prosecutors, defense attorneys, and judges trying cases before jurors who have *no* prior knowledge of the cases. In modern American practice, victims have been reduced to testifying for the prosecution just as any other witness does. Since over 90 percent of criminal cases end in plea bargains (or dismissals), most victims never get their day in court. Even when a victim does testify, the focus of the proceedings invariably remains on the defendant and his or her rights.

Individual victims express a variety of reasons for seeking greater participation in the criminal process—distrust of prosecutors and the courts, redressing a perceived bias in favor of the accused, restitution, and even retribution. But the desire to be treated fairly and with understanding and the need to be heard as victims, not merely as witnesses, are the universal concerns of the victims' movement.

It is not surprising that victims perceive our criminal justice system as favoring the accused. Our due process model was developed in response to an oppressive sovereign. Thus, the Bill of Rights was enacted to protect the defendant from a powerful government and speaks exclusively of a defendant's rights: the right to a speedy, public trial; the right to a jury; the right to counsel; the right to confront and cross-examine his or her accuser. A defendant's right not to testify against himself or herself now encompasses a right to remain silent upon being taken into custody. The law of evidence presumes a defendant innocent until proven guilty "beyond a reasonable doubt."

Decades of Advances

The proposal to amend the U.S. Constitution "to protect the rights of crime victims" that is pending before the current Congress is the culmination of several decades of legislative, judicial, and executive efforts to advance the interests of crime victims in the criminal process. Some of these changes involve special victims, such as children, abused spouses, and rape victims; other reforms affect all victims of crime.

Legal changes affecting rape victims are a good example of these reforms. Lord Chief Justice Matthew Hale's 17th-century commentary put the focus on the victim's truthfulness in rape prosecutions for almost 300 years: "while rape is a most detestable crime ... it must be remembered that it is an accusation easily to be made and hard to be proved, and harder to be defended by the accused, though never so innocent." Because rape was punishable by death, judicial interpretation added that a woman must earnestly resist her attacker, however risky. Corroboration of a woman's testimony was also required, although few rapes occur in public. Beginning in the early 1970s, the corroboration requirement was eliminated, rape shield laws protected a victim's sexual history, and the definition of rape was refined to eliminate earnest resistance.

Courts now allow expert testimony about rape trauma to explain the lack of prompt outcry and other symptoms seemingly at odds with forcible compulsion. Many police departments now use specially trained—usually female—officers to question victims. Many prosecutors' offices have assistance units for victims and skilled prosecutors who specialize in trying both stranger and nonstranger rape cases.

The overall changes achieved by victims' advocates in numerous states parallel many of the special victim reforms. Police officers are trained to be sensitive to victims' trauma when taking the report of a crime. Prosecutors' offices have victim-assistance units. Courts routinely issue orders of protection (stay-away orders) and, in certain situations, take threats to vic-

Richard T. Andrias is an associate justice of the Appellate Division, First Department, New York State Supreme Court in New York. He is also chair of the Victims' Committee of the Criminal Justice Section of the American Bar Association.

tims and witnesses into consideration when setting bail. Crime Victims' Boards provide compensation, and Victims' Service Agencies provide counseling, advocacy, referrals to shelters, and transportation to court. In most jurisdictions, court papers now keep victims' addresses and telephone numbers confidential and in certain cases—rape, for example—keep their names confidential as well.

As a case proceeds to trial, victims seek to be apprised of material developments. While most defendants understand that the prosecutor is ultimately responsible for the control of the case, victims wish to be consulted and to have the court informed of their views and concerns even when a plea bargain is contemplated. Learning about a plea after the fact is a major complaint of victims. Victims also have an interest in a speedy trial. If the resolution of a case is going to be delayed, victims seek to regain the use of their stolen property, which can be photographed or otherwise preserved as trial evidence. When a case is adjourned or continued, witnesses should be "on call" rather than having to needlessly come to court. When the victim's testimony is actually needed, a secure waiting area separate from the defendant—and his or her family and friends—should be provided.

The post-conviction phase has seen dramatic changes in victim participation. Most states now mandate that restitution must be considered when appropriate. Reports prepared for the court in aid of sentencing now regularly include a Victim Impact Statement, which describes the medical, financial, and emotional injuries resulting from the crime. A major advance in this area is victim "allocution." Many states now allow the victim or a surviving representative to speak at the sentencing hearing itself. Finally, in many jurisdictions, victims are now informed of prison-release dates and are allowed to comment at parole hearings, in person or in writing.

Regarding a victim's financial loss, restitution is presumptive in the federal courts and in many states; however, restitution and the modest amounts available from Crime Victims' Funds are often inadequate. Thus, civil actions against defendants are available in many instances. Keeping in mind the ancient maxim that no one shall be permitted to profit from his or her own wrong, New York and 47 other states passed "Son of Sam" statutes—also known as "notoriety for profit" laws. These states allow victims to recover the proceeds from felons who sell the accounts of their criminal activities. The Supreme Court struck down New York's Son of Sam statute in *Simon & Schuster Inc. v. the New York Crime Victims Board, et al.* (112 S.Ct. 50 [1991]) because the statute ran afoul of the First Amendment by imposing a financial burden on the content of speech and singling out income derived from expressive activity. State legislatures have responded by revising these statutes in various ways that they hope will meet constitutional objections. Since defendants are often without financial resources, victims have sought to bring civil actions for damages against third parties—hotels, landlords, security companies—whose negligence contributed to their loss.

Forty-five states have enacted victim bills of rights; 20 of those states have done so by constitutional amendment and the remainder by statute.

Push for Amendment

There is ample evidence that the reforms providing for victim participation have not slowed down the criminal justice process as many professionals had feared. Further, the "system" has actually been aided by the creation of a climate in which victims and witnesses are more willing to come forward.

Nevertheless, established alliances and ways of doing business die hard. Because of the uneven response to and implementation of victim participation, many groups have pushed for a constitutional amendment to guarantee a victim's right to be present and to be heard at all critical stages of judicial proceedings. Forty-five states have enacted victim bills of rights; 20 of those states have done so by constitutional amendment and the remainder by statute.

The drive for victims' rights has culminated in a proposed amendment to the U.S. Constitution. Last year's version of the amendment reads as follows:

> Victims shall have the rights to be informed of and not to be excluded from any proceeding involving a release from custody or any public proceeding in which those rights are extended to the accused or convicted offender; to be given the opportunity to be heard if present, or to submit a statement, at any proceeding involving a release from custody or sentencing, including the right to be heard regarding a previously negotiated plea; to be informed of any release or escape; to a final disposition free from unreasonable delay; to an order of full restitution from the convicted offender to protect the victim from violence or intimidation; and to notice of their rights.

A similar proposal will be introduced this year. The congressional debate will focus on, among other things, whether enhancing victims' rights will undermine defendants' rights guaranteed in the Bill of Rights, how to ensure the enforcement of victims' rights, and whether the introduction of a victims' constitutional amendment will open the floodgates to proposals to modify or eliminate traditional liberties and protections enjoyed by all. ♦

Defendants' Rights in Criminal Trials

A system in which the rights of the accused are balanced against society's interest in justice

Ralph C. Martin II and Elizabeth Keeley

Update on Law-Related Education, 21.2, 1997, pp. 24–25, 28. © 1997 American Bar Association.

If you are ever a defendant in a criminal case in the United States, you will be guaranteed the right to a speedy trial. To be convicted and imprisoned, you will have to be declared guilty beyond a reasonable doubt by an impartial jury and, in most cases, by a unanimous verdict, unless you choose not to exercise your right to a jury trial. You can, nevertheless, be jailed or held on bail before trial and during trial if the court decides this is necessary to assure your appearance at trial.

The authors of the Constitution purposely set high standards that the government must meet in order to protect innocent people from wrongful prosecution and imprisonment.

In these and other ways, the balance of rights in criminal cases is weighted in a defendant's favor in the U.S. criminal justice system. The authors of the Constitution purposely set high standards that the government must meet in order to protect innocent people from wrongful prosecution and imprisonment.

The U.S. Constitution guarantees every person accused of a crime the right to a speedy trial. Commonly, this means that the trial must begin within 180 days after the person is charged, unless the defendant causes the delay. Once a person is charged, the rights of the defendant are paramount, and his or her right to a speedy trial is controlling. Failure to provide a speedy trial can result in the defendant's release and the dismissal of the charges in the case.

Prosecutors have an obligation to seek justice, not just to convict. Therefore, they may take a case to trial only when there is evidence that would convince a reasonable trier of the facts that the defendant is guilty beyond a reasonable doubt. This is a much higher standard than the preponderance-of-evidence standard required to obtain a favorable judgment in a civil case, yet it is one that is met every day in courtrooms throughout the country.

Judge or Jury?

A defendant's right to a jury trial is one of the oldest rights in our system of justice. It traces its origins to the Magna Carta (A.D. 1215) and is guaranteed by the Sixth Amendment to the U.S. Constitution. However, courts have interpreted this right to mean that defendants must be tried by a jury only in cases in which the charges could lead to incarceration if the defendant is convicted. Thus, minor offenses are often tried before a judge.

For example, in many states, some traffic offenses (like speeding) and public nuisance offenses are criminal offenses. Yet in some of these states, the penalty for these offenses does not provide for incarceration, so the accused does not have a right to a jury trial.

Even when an accused person has a right to a jury trial, one is not automatically given. The person must exercise this right by *praying a jury*, or asking for a jury trial.

Jury Impartiality

A traditional jury consists of 12 persons, although some jurisdictions have provided for a jury of fewer than 12 persons if both the prosecution and defense agree. Jurors must be citizens of the United States.

The Sixth Amendment also guarantees defendants the right to an impartial jury. The first step in selecting a jury is to identify a random pool of potential jurors. This is done by a court official frequently known as the *jury commissioner*. The commissioner's source of obtaining potential jurors' names varies among jurisdictions. Voter registration lists and driver registration lists are two common sources. Potential jurors are issued a

Ralph C. Martin II is the district attorney of Suffolk County (Boston), Massachusetts, and a member of the ABA Criminal Justice Section's Governing Council. Elizabeth Keeley is chief trial counsel, Office of the District Attorney of Suffolk County.

subpoena to appear at the courthouse, where they form a jury "pool." Trial jurors are then selected in a process known as *voir dire*.

During jury impanelment, the judge (and in some jurisdictions, the prosecutor and defense attorney) questions prospective jurors about their ability to be fair and impartial in the case. Jurors will be excused if it is determined that they cannot be impartial, or they might be excused if jury service would impose a particular hardship at that time. Alternate jurors are also selected to fill in for jurors who may have to be replaced for any reason, such as illness or improper conduct during the trial.

When the trial is held before a judge only, the judge rules on both the law and the facts before rendering a verdict. When a jury is used, the judge rules on the legal issues during the trial and instructs the jury on the law before the panel begins to deliberate. The jury is the sole arbiter of the facts based on the testimony and evidence presented at the trial. This is an important guarantee meant to provide fairness to both the defendant and the prosecution.

The guarantee of fairness is also provided by measures taken to ensure that the jury will consider only evidence and sworn testimony provided at trial. Both the defendant and the prosecution have the right to a jury that is not prejudiced by information obtained outside the trial.

Therefore, the judge instructs the jury members that they must form their opinions about the facts solely from the evidence and testimony at trial, not from outside sources such as news stories. In some cases, in order to avoid the possibility of any extraneous influences, jurors are *sequestered,* or kept from having any unsupervised contact with their families, their friends, the media, and the public, during the trial and jury deliberations.

Sequestering jurors can be expensive and does pose hardships for jurors. Therefore, judges try to avoid sequestering a jury unless they feel it is absolutely necessary.

Unanimous Verdicts

While some states permit nonunanimous jury decisions if both the prosecution and defense agree in advance to allow them, most jury verdicts must be unanimous; that is, every juror must agree that the person is either guilty or not guilty. If the judge determines that the jury is unable to reach a unanimous verdict after a reasonable period of time, he or she will excuse the jury and declare a mistrial. In the case of a mistrial, the defendant may be tried again. On the other hand, a defendant found not guilty of an offense may never be tried for that offense again. This is the protection against "double jeopardy" guaranteed by the Fifth Amendment to the Constitution.

Why Plea Bargaining

Plea bargaining serves many purposes, and it is essential to an efficient criminal justice system. Over 90 percent of criminal cases are resolved by a guilty plea after bargaining, and not by a trial. Because plea bargaining helps reduce the number of criminal cases awaiting trial, it allows major cases to be brought to trial more quickly and ensures that the justice system's scarce financial resources can be used on the most serious cases.

A court will accept a plea of guilty only after determining that the defendant is pleading guilty because he or she is guilty and for no other reason. In addition, the prosecution must present the court with credible evidence that would satisfy the court that a judge or jury would convict if the case went to trial.

Quite often, this agreed disposition involves pleading guilty to certain less serious charges. In other instances, the "bargain" may include an agreement on some other matter. For example, it may involve a recommendation from the prosecution to the court for a particular sentence to be imposed. Frequently, such recommendations relate to endorsing a limited term of incarceration, a monetary fine, community service, or probation. Thus, plea bargaining provides a mechanism through which persons accused of crimes may dispose of their cases and receive a sentence that is reasonable in light of all the circumstances.

Although it is the defendant's right to plead guilty and to seek a result that is in her or his best interests, plea bargaining has been severely criticized as treating a person accused of crimes too lightly, since that person is not subjected to a trial on the most serious charges that could be brought. Yet pleading cases is appropriate in many different circumstances. For example, although the prosecution may be certain that a person committed an offense, sometimes there are weaknesses in the evidence, so a jury may not find the defendant guilty of the crime charged. In this instance, the prosecution can offer to reduce the charge to a lesser crime. If the defendant agrees and pleads guilty, an appropriate sentence will be imposed. This avoids the risk to the prosecution that a not guilty verdict will be rendered and no punishment imposed at all. It also avoids the risk to the defendant that a guilty verdict for a more serious offense will be rendered and a more severe punishment imposed.

Plea bargaining can also be used to convince a defendant to testify against another person who may be guilty of a more serious crime or who played a more pivotal role in the crime's commission. For example, a drug courier may be offered immunity or reduced charges if he or she testifies against the drug dealer or supplier.

In other instances, plea bargaining can be used when several persons are accused of a crime, and the only evidence is the co-defendant's testimony. This situation often presents a difficult choice for prosecutors, who may choose to deal with the person who is

continued on page 28

BEST COPY AVAILABLE

Using the Student Edition

of Update on Law-Related Education

Ronald A. Banaszak

Update on Law-Related Education, 21.2, 1997, p. 26. © 1997 American Bar Association.

"In Uniform"

After students read "In Uniform" on page A4, have them

- label two columns on a sheet of paper *For* and *Against* and list the arguments that the writers offer for and against requiring school uniforms. Encourage students to add any other arguments for or against the issue that they can think of.
- conduct a survey in their school and/or community on the issue of requiring school uniforms. As a class, they can decide on what questions to include in the survey. Then individuals or small groups can ask the questions of teachers, students, and other school personnel or members of the community. Have students compile and report the results of their survey.
- debate the issue of requiring school uniforms. Ask volunteers to choose whether to debate for or against the issue, or draw names to assign sides. There should be two or three students on each side; each student gets 5 minutes to state his or her arguments. The rest of the students act as the audience and later vote on which side they choose. The debate question could be general—"Are School Uniforms a Good Idea?"—or more specific—"Should Our School Adopt a School Uniform?" or "Should Our School Drop Its School Uniform Policy?"

"Free the Children" and "Students Fund a School"

After students read "Free the Children" on page A6 and "Students Fund a School" on page A7, have them

- research the issue of child labor. Remind them that to find the most current information they will need to look for recent newspaper or magazine articles or search the Internet. Ask the researchers to share the information they find with the class.
- follow the suggestions given in the box on page A7. Individuals or small groups can find out about the listed organizations by mail or on the Internet. They can investigate the Child Labor Deterrence Act and the Child Labor Free Consumer Act and then write to their representatives in Congress telling them why they support the legislation.
- help increase public awareness of the issue by making posters protesting the use of child labor or supporting the passage of legislation designed to deter child labor. Get permission to display the posters in your school and/or community.

"Curfews or Not?"

After students read "Curfews or Not?" on page A8, have them

- discuss the article and then list the arguments that the writers offer for and against the use of curfews for teen-agers. Encourage students to add any other arguments for or against the issue that they can think of.
- work in small groups to write a report on the local curfew situation. Are there curfews? If so, what are they? Have students contact the mayor's office and the police department and find out why the curfews were instituted, whether they have been successful, and whether there have been any problems with the curfews. If the community has no curfews, have students find out whether the question of curfews has ever been discussed. If so, what was decided?
- set up a panel discussion. Two students can role-play supporters of curfews, and two other students opponents of curfews. One students acts as a moderator to guide the discussion. The rest of the class acts as the audience and, after the initial discussion, asks questions of the panel members.

Student Articles

After students read the student articles on pages A10–A12, have them choose one of the articles and answer the related question or questions.

"Dress Code," page A10

What is the dress code at your school? Look in your school's handbook or check with the school administration to find out. Is your school's dress code consistent with the federal court rulings about school dress codes mentioned in the article?

"Model United Nations," page A10

Why do you think the skills of negotiation, compromise, and cooperation would be useful when working in the United Nations? How might these skills be useful in everyday life?

"Up in Smoke," page A11

Do you agree with what William did? Would you do what he did? Do you think using sting operations to catch those illegally selling tobacco is a good idea? Why or why not?

"No Teens Allowed," page A11 and "At the Mall," page A12

Does your local mall have a teen curfew? Do you think a teen curfew is a good idea? Why or why not? If you think a curfew is a good idea, what hours and ages would you select? Why? If you think a curfew is not a good idea, what solutions would you propose instead?

Have students complete the crossword puzzle on page 27 to reinforce their understanding of law terms and definitions.

Ronald A. Banaszak is director of Youth Education Programs for the ABA Division for Public Education.

$3.00

UPDATE ON LAW-RELATED EDUCATION

STUDENT EDITION NO. 6

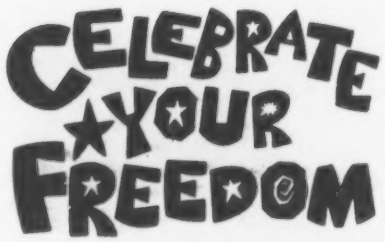
American Bar Association Special Publication for Elementary and Middle Schools

Celebrate Your Freedom!

Developed by Students for Students

Law Day, May 1, 1997

Dear Reader:



Law Day
May 1, 1997

Welcome to the sixth annual Student Edition of *Update on Law-Related Education*, published as part of the American Bar Association's Law Day 1997 CELEBRATE YOUR FREEDOM! program. In this issue, young people like you are celebrating their First Amendment freedom of speech by debating and commenting on contemporary issues of interest to them. And their opinions count.

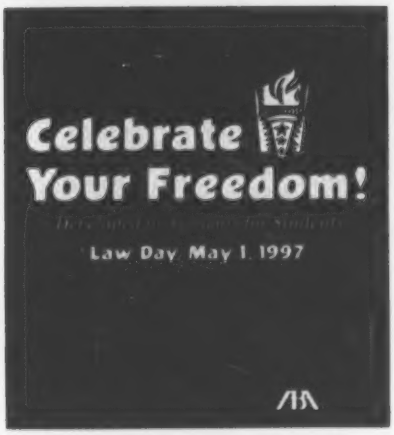
Does requiring school uniforms reduce student misbehavior? Are curfew laws an effective way of preventing juvenile crime? Should malls limit youth access to control unruly teen-agers? Each issue deals with the act of balancing rights and responsibilities. Young people have many opinions to express. We hope you enjoy—and join—the debate for Law Day, May 1.

Young people are not limited to just expressing their opinions; they can celebrate their cherished freedoms by becoming a powerful force to change the world. The plight of child laborers in Third World countries has become well-known. Yet most do not realize that several students are partially responsible for this awareness. They not only raised awareness, but took action, forming a foundation and even building a school in Pakistan. Read about them and what you can do about this issue. Selling cigarettes to minors is illegal. Would you help stop this activity? One student did. What do you think? You can make a difference, and we hope that this issue challenges you to think and to act.

Many individuals are recognized in this special Law Day 1997 issue. Each has contributed in unique ways and we extend our thanks and appreciation to them.

Ronald A. Banaszak

Ronald A. Banaszak
Director, Youth Education Programs
ABA Division for Public Education



Cover illustration by David Lee Csicsko
Cover design by DePinto Graphics
Produced by Creative Services Associates, Inc.

© 1997 American Bar Association
ISSN 1078-201X PC #497005106

Funding for this issue has been provided by the American Bar Association Fund for Justice and Education; we are grateful for its support.

The CELEBRATE YOUR FREEDOM! Law Day 1997 Student Edition of UPDATE ON LAW-RELATED EDUCATION is published by the American Bar Association Special Committee on Youth Education for Citizenship. *Chair:* Allen W. Kimbrough; *Director, Youth Education Programs:* Ronald A. Banaszak; *Director, Publishing and Marketing:* Seva Johnson; *Editor:* Mary Feely

We thank these teachers for helping students prepare submissions for this edition: Karen Brown, Sharon Clawson, Simone A. Donahue, Bernard Flashberg, Joe Larocco, Louis Lessick, Marjorie A. Montgomery, George Sagan, Trond Smith, Jill Wayne, Sara Wheeler.

The Student Edition of UPDATE ON LAW-RELATED EDUCATION is developed by students for students. The views expressed in this document are those of the authors and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association, the Fund for Justice and Education, or the Special Committee on Youth Education for Citizenship.

For information on bulk orders or class sets of this publication, contact the American Bar Association/YEFC (15.3), 541 N. Fairbanks Court, 15th Floor, Chicago, IL 60611-3314; (312) 988-5735; http://www.abanet.org/publiced FAX (312) 988-5032, ATTN.: Nessel. Internet: abapubed@abanet.org

FOR CUSTOMER SERVICE, call (312) 988-5522.

All rights reserved. Printed in the United States of America.

The American Bar Association is a not-for-profit corporation.

Printed on recycled paper.

Celebrate Your Freedom!

What's Inside?

4 In Uniform: *Do school uniforms shield students from gangs, distractions, and peer pressure?*

Out of Uniform 5
Honors student Adam Levon refuses to comply with a school uniform dress code.

6 Free the Children: *Craig Kielburger formed Free the Children, a group to eliminate child labor and its abuses.*

Child Laborer 6
The story of Iqbal Masih and his life as a child laborer.

7 Students Fund a School: *Broad Meadows Middle School raises funds to build a school in Pakistan as a memorial to Iqbal Masih.*

What You Can Do 7
Suggestions from Amy, Amanda, and Craig on how you can help end child labor.

8 Curfews or Not?: *Authorities may argue that curfews lower juvenile crime, but most contributors to the Student Edition aren't buying it.*

It's 11 O'clock! Are You Home? 9
A discussion of challenges to curfew laws.

10 Dress Code *by Mike Michaud and Danny Rosen*

Model United Nations *by Carrie Kendrick*

11 Up in Smoke *by William Hansen*

No Teens Allowed: *Some shopping centers are placing curfews on teens.*

12 At the Mall: *Teens—the most dedicated mall patrons—now find some shopping centers yanking the welcome mat.*

In Uniform

Do school uniforms shield students from gangs, distractions, and peer pressure?

Most students writing to the Student Edition say no, arguing that uniforms would infringe on their constitutional right of free expression while failing to improve public schools. Others, however, say the promise of tranquil schools makes uniforms worth a try.

"I understand that the schools and parents want to keep the children safe," writes Sindhu Kurup of Lane Technical High School, Chicago. "Most gangs have certain signals to communicate with each other. Who is to say that they won't just switch to this method? In that case, it really wouldn't matter if children were all wearing the same thing."

Gangs would defeat any uniform, predicts Joseph Dion of Ridge View High School, Columbia, S.C. "If there is a dress code, gang members can still dress alike by rolling up a sleeve or a pant leg or something like that."

But uniforms can protect students from inadvertently wearing gang colors, points out Marilou Jimenez of Lane Tech. "Wearing uniforms can help prevent fights or gang-related shootings in school."

Schools that mandate uniforms appear to fight crime but actually sidestep it, writes Lindsay Sherrill of Ridge View. "I think the schools should find out which kids are causing the problem and fix it instead of trying to cover up the problem with uniforms."

Yet, statistics show schools that require uniforms are safer for students, writes Matt Coons of Service High School, Anchorage, Alaska. "There comes a time in life when you have to give up a little of your freedom in order to get anywhere to improve. The uniforms don't have to be drastic—maybe jeans, skirts, or slacks with a certain color of top. Why not make schools safer?"

Because the First Amendment of the U.S. Constitution guarantees freedom of expression, some students believe that requiring uniforms infringes on their constitutional rights. "By forcing students to dress a certain way, schools limit their students' freedom of expression and violate students' rights," writes Rachel Brodin of Frank Ashley Day Middle School, the Public Schools of Newton, Mass.

Rachel believes limits are needed: "When student expression interferes with school safety or distracts other students, the school should be able to place guidelines on student expression. ... However, telling students that they have to wear a specific color and style of clothing to school every day is extremely unnecessary and unfair."

The threat uniforms pose to students' First Amendment rights is too great, agrees Jason Mankevich of North Allegheny Senior High School, Wexford, Pa. "The dress code is an idea that would curb gang influence. I am sure that it would, but at the same time it impinges on your rights."

Uniforms are divisive because they stifle students' diversity and self-expression, argues Fakhita Bukhari of Lane Tech. "It's almost like taking away their identity and giving them one which you believe to be better," she writes.

But uniforms would limit divisive peer pressure, counters Sarah Hood of Ridge View. "Some students make fun of other students because they don't wear brand-name clothing. With uniforms, everyone would be dressed the same, so it wouldn't matter."

Michael Kolejka of Cave Spring High School in Roanoke, Va., agrees. "Whether it be inner-city slums or upper-class suburbia, many young people fall victims to 'fashion harassment' where they can't even walk the halls without being criticized about the clothes they wear. Even worse, clothing has been the source of several violent fights. ...

"The arguments made against school uniforms —that they will inhibit student expression and individuality—are unfounded. A student's character should be judged according to his or her personality and talents, not by what kind of shirt he or she wears."

Jonathan Lee, Lane Technical High School, Chicago, Illinois

Michelle Miller of North Allegheny doubts that uniforms can alter student behavior. "People seem to believe that wearing nice clothes encourages students to study and act in a well-behaved manner. Throughout my 10 years in a Catholic school, I observed many personalities. Misbehaving students breaking the rules still existed even with a dress code. ... I believe that uniforms do not have an effect on students' behaviors; and if students want to misbehave, they will do so, uniform or not."

Adds Kesha Entzminger of Ridge View, "The discipline and morals need to change, not the attire."

But Carlos Carre, Jr., of Olney High School, Philadelphia, Pa., believes uniforms keep students focused on learning. "I had been wearing uniforms almost all my life in Haiti. If we wear uniforms, we won't have to be concerned about other people's clothes and our minds will concentrate more on school work. I've only been in the United States for three years. From my observations, uniforms play an important role in learning."

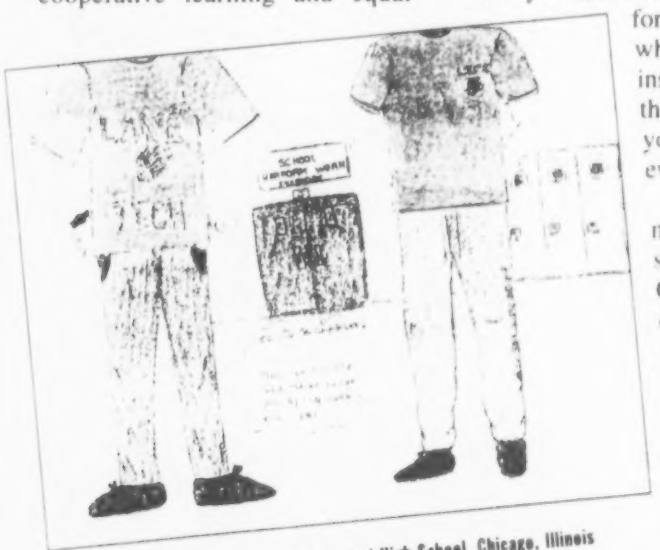
Adds Gina Cardillo of North Allegheny, "As the emphasis regarding education tends to favor cooperative learning and equal opportunity for all students, starting with at least a standard appearance seems mandatory."

Matt Carrier of Ridge View finds uniforms to be an exercise in hypocrisy. "Kids are told 'it is what is on the inside that counts.' Yet uniforms tell them otherwise. When you make them wear a uniform, it tells them what is on the inside counts, but the clothes that you wear count even more."

Both arguments are persuasive, writes Candle Fogle of Ridge View High School. "We want to have uniforms to cut back on violence in schools. But we don't want them because we won't feel like individuals if we can't express ourselves through the way we dress. It is hard for me to decide, as a teen-ager, what we should do because I agree with both sides."

Jim Ramsay of Service High School rejects the arguments of both sides. "That which students wear to school does not influence their behavior, though their lifestyle may have an impact on what they wear. ... There is not reasonable support for a dress code or a mandated school uniform.

"However, there is no rational human being who would say that his or her individual expression is significantly inhibited by the imposition of a dress code. Both sides of the traditional argument are equally unfounded."



Sandra T. Anaya, Lane Technical High School, Chicago, Illinois

Out of Uniform

When seventh-grade honors student Adam Levon refused to wear his public school's new uniform, the ensuing dispute continued even after he was expelled.

Officials at Wentworth Junior High in Calumet City, Ill., say the uniform helps eliminate gang colors. Adam's parents say buying the new clothes would violate their Baptist tradition of thrift. They are challenging the uniform in a federal lawsuit. In December, a judge refused to order the school to readmit Adam until the suit is settled.

Uniforms' fans include President Bill Clinton, who says, "School uniforms are one step that may be able to help break this cycle of violence, truancy, and disorder by helping young students understand that what really counts is what kind of people they are, what's on the inside." Clinton ordered the U.S. Department of Education to send a manual on uniforms to the country's 16,000 school districts.

The general public is less enthusiastic. A 1996 survey of 2,059 adults and high school students by Kids Voting USA found that 64 percent of students opposed uniforms, 22 percent were in favor of them, and 13 percent were unsure. Among adults, 43 percent opposed uniforms, 43 percent were in favor of them, and 15 percent were unsure.

Free the Children

Young people fight to stamp out child labor.

When Craig Kielburger read a newspaper article about bonded child laborers, he was stunned.

"I thought slavery was part of the 19th century, not part of the 20th century," says the Canadian teen-ager from Thornhill, Ontario. "I thought it couldn't be true."

The April 1995 report that caught Craig's eye as he looked for the comics focused on the murder of 12-year-old Iqbal Masih, a freed Pakistani child laborer. (See box.)

Craig was struck by the contrast between his own comfortable life and the cruelty Iqbal had suffered before his violent death. "I was also 12 at that point, and I felt a tie to him because of that," he adds.

Now 14, Craig no longer doubts the reality of child labor. He's helped form a group to stamp it out. He has met kids in Asia, Haiti, and Brazil who work repairing cars, weaving carpets, and plying the sex trade. He's spoken against such exploitation before U.S. congressional committees. In December, he won the 1996 Reebok Human Rights Youth in Action Award for his activism.

"Along the way I learned that an average group of kids had the power to bring about positive changes in their community, country, and world," he says. It all began when Craig told classmates about Iqbal. Outraged, they decided they wanted to join an organization that fought child labor but also gave young people a voice in how it was run. When they couldn't find one, they founded their own: Free the Children.

Only people under 18 may join Free the Children, although adults may be associated members. "For young people today, it's almost like a dream to have an active voice," says Craig. "Now we're the ones speaking out."

Free the Children helped introduce a special label for carpets and other imports made without child labor. It persuaded the Toronto City Council to ban city use of fireworks that were made by children. And the group won a change in Canadian law to allow the prosecution of Canadians who sexually exploit children abroad.

But Canadian leaders didn't always take Free the Children seriously. They only began paying attention after Craig embarrassed Prime Minister Jean Chrétien during an Asian trade mission in January 1996, when Craig was also in Asia.

"Somebody told me that to truly understand the plight of working children, I would have to meet them myself." With a chaperone, Craig talked to kids in all kinds of workplaces, from metal factories to fireworks plants. He asked to meet Chrétien to urge him to discuss child labor with Asian leaders, but Chrétien said that he was too busy. Craig held a press conference, the story reached Canadian newspapers, and the next day the prime minister agreed to meet. "It was a moment to remember," laughs Craig.

The United Nations puts the number of child laborers at 250 million. Craig believes children are hired because they're cheap, easily intimidated, and forbidden to form trade unions. "India has 15 million child laborers but 55 million unemployed adults," he points out. "Poverty is not an excuse for child exploitation."

Asked which of Free the Children's achievements he's most proud of, Craig cites two changes: that in Canada's criminal law and that in young people themselves.

"Young people are starting to realize the power they have to bring about change in their community, whether they fight child labor or organize a food drive or give clothes and blankets to people on the streets."

Child Laborer

In 1986, Iqbal Masih's parents sold him to the owner of a carpet mill near Lahore, Pakistan, for 600 rupees (about $12). Iqbal worked 12 hours a day to pay off his parents' debt. He was chained to a carpet loom, frequently beaten, and paid one rupee a day. He was 4 years old.

Six years later, Iqbal escaped to attend a meeting of the Bonded Labor Liberation Front (BLLF). There, Iqbal told his story, and a BLLF lawyer helped him get a letter of freedom. He began attending school.

Bonded labor is illegal in Pakistan, but the law is rarely enforced. Iqbal used his freedom to tell the world about Pakistan's 7.5 million bonded children. He received the 1994 Reebok Human Rights Youth in Action Award.

On April 16, 1995, Iqbal was shot to death. Many suspected that he was killed by the carpet industry, but an independent group called the Human Rights Commission concluded that Iqbal was murdered in a petty dispute.

What You Can Do

How can you help end child labor? Amy, Amanda, and Craig offer these tips.

- Learn more about child labor. Free the Children will send information if you write to 16 Thorn Bank, Thornhill, Ontario, Canada, L4J2A2. Or, check its World Wide Web site at http://freethechildren.org. You can also write to Broad Meadows Middle School, 50 Calvin Road, Quincy, MA 02169, or visit its "A Bullet Can't Kill a Dream" site at http://www.digitalrag.com/mirror/iqbal.html.
- Become a concerned consumer. When you buy items commonly made by children—rugs, soccer balls, medical utensils, bricks, fireworks—ask the retailer or manufacturer whether child labor was used. The Rugmark label on carpets and a special label on Reebok soccer balls certify that they were made without child labor.
- Write to your representatives in the U.S. Senate or House of Representatives urging support of the Child Labor Deterrence Act, which would ban imports made with child labor. Also write in support of the Child Labor Free Consumer Act, which would label clothes and sporting goods made without child labor.

Students Fund a School

A school is built in Pakistan.

Iqbal Masih's memories of a childhood spent chained to a loom shocked seventh graders in Quincy, Mass. Like them, Iqbal was 12 when he visited Broad Meadows Middle School in December 1994, but he looked much younger because of severe malnutrition and years of immobility. He showed them scars left by ill treatment during six years as a bonded laborer.

"He told us his dream was for all children to be free and have an education," recalls Amy Papile, now 14, "but there wasn't a school near his village."

So, when the students heard Iqbal had been murdered just a few months after his visit, they knew exactly how to keep his dream alive: build a school in Pakistan.

Their memorial to Iqbal became a reality late last year, when a new school in the Punjab region opened its doors to 278 children. The pupils, between 4 and 12 years old, are all former bonded laborers or at risk of being sold into bondage.

The school was built thanks to $130,000 raised by the kids at Broad Meadows. They formed a partnership with Sudhaar, a small Pakistani organization that will use some of the money to help 50 families buy back children sold into bondage. In addition, Sudhaar will launch the Iqbal Masih Education Foundation to fund the school's daily expenses by its third year.

The Broad Meadows students raised the $130,000 by E-mailing requests to schools around the country. They asked for donations of $12, the amount for which Iqbal had been sold into bondage.

"We got a lot of responses," says 15-year-old Amanda Loos. "The volume was surprising, but I guess a lot of people thought $12 wasn't that much to give."

With the help of local Amnesty International volunteers, the students opened a World Wide Web site called "A Bullet Can't Kill a Dream." It quickly became one of the Web's most visited sites. Amy and Amanda were invited to address a congressional forum on child exploitation. And the students' efforts won the school the 1995 Reebok Human Rights Youth in Action Award.

Amy found it difficult at times to balance campaign work, school, soccer, drama, and a social life. "What helped us succeed was people writing encouraging letters. Sometimes there'd be a lull, and then a really cool set of letters would come in and make us feel glad. One was addressed to 'the dudes in Pakistan.'"

Although the campaign is officially winding down now that the school is open, donations are still coming in. Amanda says they will go to the school "to buy more books and maybe even a playground."

For Amanda, the kids' greatest achievement—besides building the school—was educating thousands of people about child labor. "A lot of people don't want to look at the issue," she says. "Others are amazed this is still going on. So we were teaching adults something they didn't know."

The crusade also left its mark on her. "I used to be real quiet and didn't like getting involved," admits Amanda. "Now I have a big mouth—you can't shut me up."

Curfews or Not?

Authorities may argue that curfews lower juvenile crime, but most contributors to the Student Edition aren't buying it.

Some see curfews as a valid way to help keep America's streets—and teens—safe. But more resent curfews as a curb on their liberty that offers no guarantee of personal safety.

"Who is the government to say when I need to be home?" asks Matt Coons of Service High School, Anchorage, Alaska. "I work 40-plus hours a week and attend school full time as a senior. I don't get off work until 1 or 2 in the morning. My city has a curfew of 11 P.M. on school nights and 1 A.M. on weekends.

Alexis Murono, Dent Middle School, Columbia, South Carolina

"I don't think it is fair that in the state of Alaska a minor can be tried as an adult, yet has to be in at a certain time. Who are they to pick when I'm an adult or not?"

Courts differ on whether curfews are constitutional, points out Rachel Brodin of Frank Ashley Day Middle School, the Public Schools of Newton, Mass. "Although the curfews' purpose, to lessen violence and crime, is advantageous, the curfews violate the rights of minors and shouldn't be permitted.

"In the 1975 case of *Bykofsky v. The Borough of Middletown*, the U.S. District Court ruled that minors' conduct may be constitutionally regulated to a greater extent than that of adults, and that the curfew ordinance in Middletown did not infringe on the First Amendment rights of minors or the rights of minors to travel.

"However, recent rulings have disagreed with that decision. In the 1989 case of *Waters v. Barry*, the U.S. District Court determined that the District of Columbia juvenile curfew law violated minors' First Amendment rights and Fifth Amendment rights to due process and equal protection."

Jeff Shannon from Licking Heights High School, Summit Station, Ohio, believes that curfews violate his constitutional rights yet fail to combat crime.

"Many American cities are imposing stricter curfews on minors in order to lower crime," he writes. "Although they are popular, such curfews probably won't succeed in their purpose. Curfews like these, by not allowing free speech and the right to assembly, violate the Constitution's First Amendment.

"The minors that the curfews target, those committing the crimes, will probably just ignore curfew, get punished, and violate it again. They couldn't care less about obeying curfew. The only minors who really get punished are the good kids who have shown that they can act responsibly even when they're out late—they have to come home early to make curfew."

But a curfew can curtail juvenile crime, counters Scott Horton of Ridge View High School, Columbia, S.C. "It could help keep teen gangs off the streets at night," he points out. "Some gangs may be good, but the bad ones could cause trouble. They may be doing drugs or breaking into stores or houses. A curfew could stop a lot of drug use because it is easier to get caught in the day and early nighttime."

If teens are home early, they're less likely to become crime victims, adds Lauren Sanders of Ridge View. "It is fair because it keeps you safe at night. ... Curfews would work, but you would have to put more police officers out at night to patrol the streets to make sure nobody was out."

Unconvinced of curfews' effectiveness is Ericke Evans of North Allegheny Senior High School, Wexford, Pa. "The curfew was established to reduce crime, but there will always be crime no matter what. I do not think curfews will succeed be-

Nicolette Coleman, Krystal C. Wallace, Lane Technical High School, Chicago, Illinois

cause if teen-agers want to try and break curfew, they will do it and have a good chance of getting away with it."

Another skeptic is Carl Young of Ridge View. "If people are going to commit a crime at night, it doesn't matter what the curfew is, they are going to commit it anyway. It is not fair to the kids who are just going out to have fun. They aren't doing any harm."

Adds Melissa M. Nuney of Licking Heights, "Even with stricter curfew laws, kids will still find a way to be out. That's how society is today." Melissa has a better idea: Provide safe places for teen-agers to gather. "The kids who do have an active night life are the ones I feel we need to concentrate on, maybe making more appealing places for teens to hang out at," she suggests. "That's all anyone wants. I don't feel everyone goes looking for trouble."

Minors can challenge curfews, points out Jennifer Parlett of Clara Driscoll Middle School, San Antonio, Texas. "Many states have imposed curfews on minors in an effort to lower crime," she writes. "In the state of Texas, on weekdays, minors are restricted from being out from 11 at night until 6 the next morning. Recent statistics show that in years past, the rate of crimes committed by juveniles has increased.

"In October 1996, a U.S. district judge Emmet G. Sullivan issued a permanent injunction against the Washington, D.C., curfew. He blasted the law, saying that it would prevent students from participating in harmless activities, such as early morning sports practice.

"The American Civil Liberties Union (ACLU), which brought the lawsuit to court, hailed the ruling as an important victory for the rights of young people. This victory shows that it is important to fight for the rights of minors."

Curfews allow the government to intrude into family life, says Ann Marie Love of North Allegheny. "Teen-age curfew laws are supposed to take kids off the streets and put them into their own houses, but they seldom accomplish this. The public supposedly feels safer having the kids off the streets, but would it assuage them to know that most kids, instead of going home, go elsewhere?

"The kids feel violated, that personal rights of theirs are taken away, and the parents are relinquishing one more responsibility to the government. It's not the obligation of the government, or law enforcement, to take teens off the streets. It is the parents' duty."

Curfews would be more fair if they were aimed only at those with past criminal convictions, suggests Josh Sappenfield of Ridge View. "These people don't deserve the right to go out at night. Teen-agers should not have to give away their night life unless they forfeit it to bad behavior."

By contrast, Erik Bencivenga of North Allegheny wants to see curfews firmly applied. "The only way these laws are going to work is if the law-enforcing officers enforce them to the max. These new curfew laws are extremely fair. What teen-ager in this world must be out until 3 in the morning? The new curfews should keep the kids in line, out of trouble, and in the house at a safe, respectable time."

It's 11 O'clock! Are You Home?

At least 1,000 American communities, including at least 146 of the 200 largest cities, have curfews on the books, according to the University of South Alabama.

The curfew Pittsburgh, Pa., adopted in November 1996 is typical. City residents aged 16 or younger must be home by 10 P.M. on school nights, 11 P.M. on summer week nights, and midnight on Fridays and Saturdays. Unless accompanied by a parent, young people may go out after these hours only to work; run an errand for a parent; or attend a school, religious, or civic function.

Cities argue that curfews lower crime. Cincinnati, for example, says juvenile arrests for serious crimes are down 13 percent since its curfew went into effect in July 1995. Opponents of curfews, such as the American Civil Liberties Union (ACLU), claim that such laws infringe on minors' freedom of movement and association.

Lawsuits challenging curfews have had mixed results. Between 1976 and January 1996, six curfew cases reached federal courts. Three of the laws were upheld and three were struck down. In October 1996, U.S. district judge Emmet G. Sullivan ruled that Washington, D.C.'s, curfew was unconstitutional. "Minors possess a fundamental right to free movement to participate in legal activities that do not adversely impact on the rights of others," he wrote.

But by the previous May, the U.S. Supreme Court refused to review the curfew of Dallas, Texas. The court's refusal meant the curfew stayed in place. And curfews won the support of President Bill Clinton, who said, "they help keep our children out of harm's way."

Dress Code

By Mike Michaud and Danny Rosen

Frank Ashley Day Middle School, the Public Schools of Newton, Mass.

Mike Michaud and Danny Rosen

On November 6, my classmate Danny Rosen and I, Mike Michaud, went to the office of Dr. Janet Goldrich, assistant superintendent of Newton Public Schools, to address the issue of an unconstitutional dress code within the school. The dress code prohibited students from wearing T-shirts that were considered lewd, vulgar, or profane by teachers or other adults within the school.

Decisions rendered about dress codes by the Massachusetts Supreme Judicial Court and a First District Federal Court basically state that you can't make a student remove an article of clothing unless it causes an actual disruption within the school. The Students' Rights and Responsibilities Handbook for Newton Public Schools states, "Although the Newton Public Schools have no dress code, students will be expected to dress in a manner which is not disruptive to the educational process and does not pose a danger to the students or others."

Danny and I believed that "coed naked" T-shirts, etc., were not disruptive to the learning process and certainly did not pose a danger to the students or others. We cited the *Tinker* case (*Tinker v. Des Moines Independent School District*, 393 U.S. 503 [1969]), the *Pyle* case (*Pyle v. South Hadley School Committee*, 55 F. 3d 20.22 [1st Cir. 1995]), two newspaper articles, and a magazine article ("Dress Codes and the Public School System") to prove our point.

When we confronted Dr. Goldrich with our citations, she completely agreed with us and was very helpful in prompting the schools to change their policy. A notice was then sent out, notifying Newton principals about the change in the dress code.

Model United Nations

By Carrie Kendrick

Dent Middle School, Columbia, S.C.

For decades, the world has been trying to achieve world peace. On October 24, 1945, an international organization that works for peace was founded: the United Nations. From it has been formed the Model United Nations, a junior version of the United Nations that gives teen-agers the opportunity to learn about democracy, discuss realistic world problems, and decide how to solve them.

Model United Nations deals with real-life problems from all around the world. Its participants are required to propose solutions to these problems.

A very important problem they are facing now is that children worldwide are being denied their basic human rights. These children are being subjected to child labor, disease, sexual exploitation, and life on the streets. More than 250,000 children die every week from malnutrition and disease.

Members of Model United Nations found 12 solutions to this problem and continue to add to this list as they learn more about the situation. Not only do they work on solutions to these various problems, they also learn how the United Nations is organized and the responsibilities of its members.

Each year, Model United Nations students attend a conference at which they represent their assigned countries as delegates to the United Nations. Prior to the conference, the students write about the position of the country they are representing.

Once at the conference, the delegates are expected to fully act out the role of representative. They learn the proper conduct of a United Nations official and also learn to think on their feet, a much-needed skill in democracy today. The participants write and deliver speeches and learn to negotiate. At the end of the conference, they discuss all the activities.

Much preparation, hard work, and dedication is needed from each Model United Nations member in order for its team to be successful. It takes strong, intelligent people to make this group work, just as it does in the United Nations.

Model United Nations gives young people the opportunity to see and understand how our democracy works. It gives good experience in working with others in solving problems.

In my opinion, our world is a better place today because of Model United Nations and what it does for young people.

Up in Smoke

By William Hansen

Cranford High School, Cranford, N.J.

Democracy can simply be defined as rule by the people. There are many different characteristics of a democracy, including the people's responsibility to participate in developing and upholding laws.

One of the laws that I directly upheld was the New Jersey Disorderly Persons Law 2A:170-51: "Sale or furnishing of cigarettes or tobacco in any form to minors—Any person who directly or indirectly, acting as an agent or otherwise, sells, gives, or furnishes to a minor under the age of 18 years, any cigarette made of tobacco or of any other matter or substance which can be smoked, or any cigarette paper or tobacco in any form, including smokeless tobacco, shall be punished by a fine of $250." New Jersey has been enforcing this law by using minors in sting operations to detect the illegal sales of tobacco.

In March 1996, my town's health department needed a teen-ager under the age of 18 to participate in the operation. I was asked to be the undercover agent. At first, I was reluctant because I did not know how my friends and classmates who were smokers would react. But I figured what the heck, sticks and stones may break my bones, but names will never hurt me. I had the opportunity to make a difference, so I notified the municipal health official that I would participate in the sting.

Several months before the actual sting operation, the health official had gone in person to each of the 31 stores selling tobacco and notified them of the current law and its penalties.

Sometime in April 1996, I began the first day of my undercover operation. I was dressed in a T-shirt, blue jeans, and a baseball hat and did not look a day over 16.

The municipal health official went over the guidelines I had to follow. When I entered a store, I had to make a note of the store owner's sex, race, and approximate age for evidence purposes. If I was asked to show identification, I had to show my own or tell the store owner that I did not have any. If I was asked my age, I had to tell the store owner I was 16.

We approached the first store, and the health official gave me money to buy the cigarettes. I walked in, a little nervous, and asked for a pack. I was refused. Then I went to the second store. I was turned down again. Next, I arrived at the third store. Once again, I was refused.

This went on for about another seven stores. I had gone into 10 stores, and 10 times I left without a pack of cigarettes. I was beginning to wonder how young I really looked. Then at the 11th store, with no questions asked, I was able to buy cigarettes.

I went back to the car, and the cigarettes were marked for evidence. The store had a summons in the making.

Out of the 31 tobacco-selling establishments in my town, I was able to buy cigarettes illegally in seven. I had personally earned the town a grand total of $1,750 (and to date have not seen a penny of it!).

Several months later, I overheard some of my schoolmates discussing how hard it now was to buy cigarettes. Although I know I did not sign a peace treaty or balance the budget, I helped uphold a law in my state and country.

I believe that by participating in democracy, I have made a difference in my community.

No Teens Allowed

Complaining of rowdy teen-agers, the giant Mall of America in Bloomington, Minn., imposed a teen curfew last October. Nobody under 16 can enter the mall after 6 P.M. on weekends unless an adult aged 21 or older comes along.

"We have not had one fight among kids since we've done this," said spokesperson Teresa McFarland. Previously, frequent fights broke out among the 3,000 to 5,000 teen-agers who gathered at the mall on weekend nights.

The Mall of America isn't totally alone—its policy copied that of Asheville Mall in Asheville, N.C. Other malls do have less drastic restrictions, however. For example, The Mall at 163rd Street in North Dade City, Fla., and Chicago's Ford City Shopping Center bar under-16s during school hours.

Malls say such policies combat crime and truancy. Others say, however, that malls that discourage teen-agers risk losing out on their purchasing power—estimated at between $60 billion and $100 billion nationwide.

At the Mall

Teens—the most dedicated mall patrons—now find some shopping centers yanking the welcome mat. Some contributors to the Student Edition sympathize with the malls' need to keep order. But most say banning all young shoppers during certain hours unfairly penalizes those who are well-behaved.

"The idea that in some malls across America teens must be accompanied by an adult is totally bogus," writes Brad Wahl of North Allegheny Senior High School, Wexford, Pa. "Just because a few teens do something bad and vandalize something doesn't mean that all teens will act the same."

Malls need to be more creative, suggests Loren Nix of Ridge View High School, Columbia, S.C. "There are different solutions to this problem. One is that malls could increase their security."

Chad Schanker of North Allegheny thinks limits on teen shoppers are reasonable. "The mall is a place where bored kids go to find trouble. ... [Restrictions] might also cut down on shoplifting, allowing retailers to lower prices. So in the end it would benefit everyone, by offering lower prices to customers, making the mall more profitable, and keeping kids out of trouble."

By contrast, Heather Petronic of North Allegheny thinks malls that discourage teens may hurt themselves. "Malls that restrict teens under 16 at certain times during the day are keeping business away."

Malls are de facto public places, argues Megan Apple of Ridge View. "If malls are concerned about teenage violence in their stores or food courts, they need to hire more security. But as long as malls are public places, they cannot restrict their customers."

Curtailing teens should be part of a wider security plan, suggests Ryan Sarson of Ridge View. "I think shoppers under 16 should be accompanied by a person of 18 years of age or older. Then [malls] should step up security. If there were more police and security, it would deter people from starting things."

Restrictions also make sense to Michelle Miller of North Allegheny. "I think teens under the age of 16 should be at the mall with a mature adult. The adult does not necessarily have to walk around with them, but if something were to happen, the adult would be available."

The ban is aimed at the wrong people, says Megan Shaw of Dent Middle School, Columbia, S.C. "This banning thing is not going to work anyway. The older teens cause these kinds of incidents, not the younger ones."

DIVISION FOR PUBLIC EDUCATION
AMERICAN BAR ASSOCIATION
YEFC/15.3
541 North Fairbanks Court
Chicago, IL 60611-3314
http://www.abanet.org/publiced
(312) 988-5735
Internet: abapubed@abanet.org

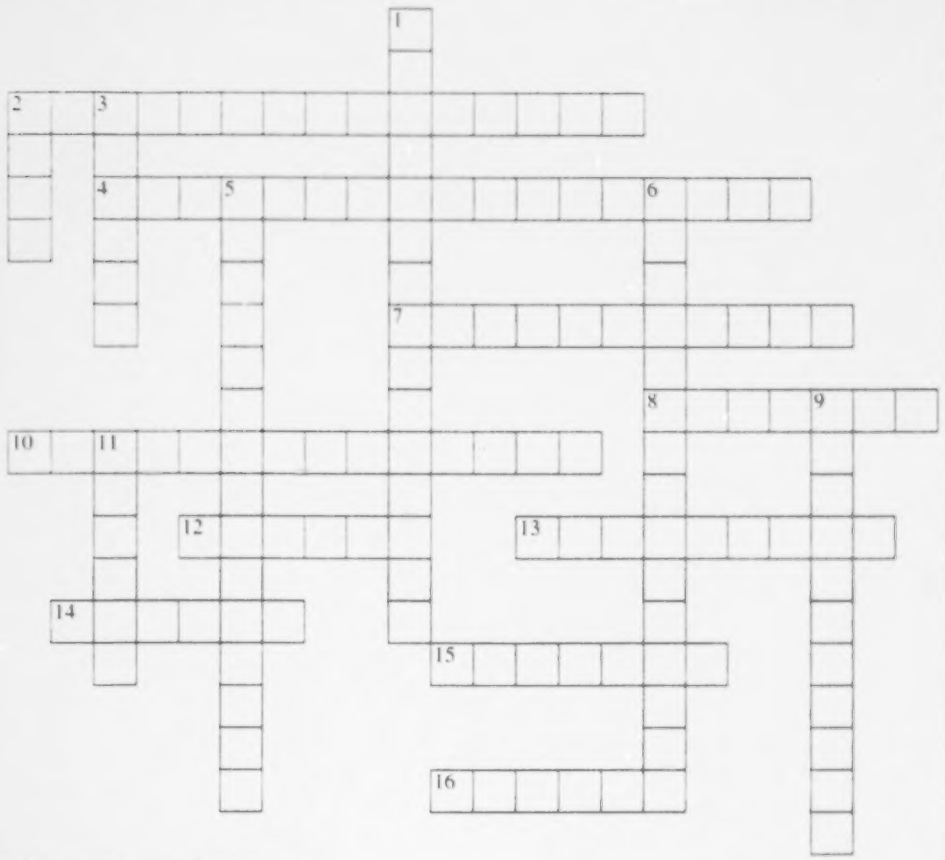
ADDRESS CORRECTION REQUESTED

Non-Profit Organization
U.S. Postage
PAID
American Bar Association

Law Term Puzzle

Use the clues and the following terms to complete the crossword puzzle. *Answers can be found on page 51.*

accused
appeal
community policing
cruel and unusual
felony
Fifth Amendment
Fourth Amendment
intent
jury
juvenile justice
Miranda warnings
misdemeanor
parole
sequester
speedy trial
victim
witness



Across

2. The court system for young people who are accused of crimes
4. A law enforcement program in which law officers and the public cooperate to fight crime
7. A crime that is less serious than a felony
8. A person who is charged with a crime
10. The part of the Bill of Rights that protects against self-incrimination
12. Conditional release of a prisoner before his or her sentence is completed
13. Separating jury members from the rest of society during a trial
14. The plan or purpose to commit a crime
15. A person who gives evidence at a trial
16. A request to have a higher court review the decision of a lower court

Down

1. The part of the Bill of Rights that protects against unreasonable searches and seizures
2. A panel of persons who are sworn to give a verdict in a trial
3. A person who is adversely affected by a crime
5. A listing of the rights a person has that is read when he or she is arrested
6. The type of punishment that the Eighth Amendment protects against
9. A right of those accused of crimes that the Sixth Amendment offers
11. A very serious crime

Puzzle ideas created by Zellar Jenkins and Lena Henderson, Lane Technical High School, Chicago, Illinois.

Update on Law-Related Education, 21.2, 1997, p. 27. © 1997 American Bar Association.

continued from page 25

less culpable to prevent the crime's principal perpetrator from escaping prosecution and conviction.

Persons are often charged with numerous offenses, and plea bargaining is used in situations in which it is impractical to bring a person to trial for all offenses charged. After thorough consideration, the prosecutor may determine that some charges are not supported by evidence and dismiss these in the course of plea bargaining. Sometimes it is impractical to try a person for all the offenses, even if they are all supported by the evidence. For example, a person who is convicted of a single armed robbery may receive a long prison sentence. Even though this person may be accused of committing other armed robberies or related offenses (for example, carrying a deadly weapon), no practical purpose is served by holding multiple or lengthy trials that are unlikely to yield more severe punishment. Another reason to dispose of or dismiss related charges is to avoid using the court's resources to obtain an impractically long sentence, such as a prison term that exceeds the person's life expectancy. Therefore, it is sometimes more practical to negotiate a plea to a single very serious charge in exchange for dismissing or reducing the charges for the other less serious offenses. ♦

Why Plea Negotiations? A Scholar's View

by John Paul Ryan

There is a widespread view that plea bargaining is a required part of the criminal justice system because there are too many cases to be tried. Like many views, this is a half-truth. Social science scholars who have conducted empirical and historical studies of criminal courts (see, e.g., Heumann 1977) have found that even in rural jurisdictions with very little crime and small caseloads, about 90 percent of all cases do *not* go to trial—instead they are resolved by guilty pleas usually involving negotiated charges and/or sentence.

Why is this so? It's probably because most cases that proceed beyond the prosecutor's initial screening have "dead-bang" evidence (eyewitnesses, video pictures, smoking guns, confessions, for example) against the defendant. For most cases, then, the issue to be resolved is not whether the defendant committed the crime but what kind of sentence he or she should receive. Trials, in fact, are reserved *mostly* for cases in which there is a reasonable dispute about whether the defendant did it (as in the O. J. Simpson criminal trial). These trials may or may not involve the most serious crimes, however.

There has been much scholarly debate about whether defendants receive more lenient treatment following a guilty plea than following a jury trial. Much of the empirical evidence suggests that defendants who plead guilty do receive less severe sentences than those who go to trial and are then found guilty. However, while the public may view this as "inappropriately lenient treatment for criminals," scholars tend to view it as unnecessarily harsh treatment—a penalty—for defendants who exercise their constitutional right to a jury trial. Is the normal or appropriate sentence the one imposed after a trial or the one "negotiated"? If normal is equivalent to routine or most common, then by their very frequency plea negotiations—not trials—set the standard against which to judge the harshness of a sentence.

Finally, plea negotiations involve a different mix of actors from jurisdiction to jurisdiction. Defense attorneys and prosecutors always participate, but they are sometimes joined by probation officers (through the probation sentencing recommendation and report) and the judge (see, e.g., Eisenstein *et al.* 1988; Ryan and Alfini 1979). In some states and locales, judges take an active role in plea discussions between prosecution and defense; in other jurisdictions, state court rules (reflecting the ABA Standards) or local custom prohibit or discourage judicial participation. In all jurisdictions, the proposed plea agreement needs to be presented to and ratified by a judge. Judges today may wish a greater "say" on the charge/sentence recommendation reached, since they increasingly recognize that, otherwise, they abdicate a judicial voice in most sentencing decisions.

John Paul Ryan is the director of college and university programs for the ABA Division for Public Education.

Resources

Eisenstein, James, Roy B. Flemming, and Peter F. Nardulli. *The Contours of Justice: Communities and Their Courts.* Boston: Little Brown, 1988.

Eisenstein, James, and Herbert Jacob. *Felony Justice: An Organizational Analysis of Criminal Courts.* Boston: Little Brown, 1977.

Heumann, Milton. *Plea Bargaining: The Experiences of Prosecutors, Judges and Defense Attorneys.* Chicago: The University of Chicago Press, 1977.

Ryan, John Paul, and James J. Alfini. "Trial Judges' Participation in Plea Bargaining: An Empirical Perspective," 13 *Law and Society Review* (1979): 479–507.

Teaching Strategy

Rights of the Accused

Adapted from *That Delicate Balance II: Our Bill of Rights, An Instructor's Guide* edited by Howard Kaplan, American Bar Association, pp. 37–45. *Update on Law-Related Education*, 21.2, 1997, pp. 29–30. © 1997 American Bar Association.

Background

In criminal investigations, police and other officials must follow procedures to protect the rights of those suspected and accused of crimes. These procedures are based on guarantees provided by the United States Constitution.

This teaching strategy has been adapted from the Instructor's Guide to *That Delicate Balance II: Our Bill of Rights*. You can obtain information about the guide from the ABA.

Objectives

As a result of this lesson, students will

- Analyze the procedures followed in a hypothetical investigation and trial
- Identify constitutional rights that protect individuals suspected and accused of crimes
- Draw conclusions about whether constitutional rights were protected or violated

Target Group: Secondary
Time Needed: 1–2 classes
Materials Needed: Student Handout, legal resource adviser

Procedures

1. Invite a legal expert to assist in the activity. Tell students that they will consider the rights of the accused in a hypothetical murder case.

2. Introduce the case.

Seven-year-old Becky Carson has been brutally murdered at school. Police rush to the school and begin questioning students and school staff. When investigators question school custodians Frank and Hector about Becky Carson's death, they suspect that there might be evidence of the crime in a gym bag on the floor in the custodian's closet.

Investigators' conversations with and observations of Becky's friend Alice strongly suggest that Frank and Hector should be brought in for questioning, but they are not yet under arrest. An officer does read them their *Miranda* rights.

Each time investigators ask Frank a question, he just sits very quietly and does not say anything. One investigator lies in order to force Frank to confess, telling him that Hector is accusing him of the crime. Frank makes an incriminating statement.

Frank is indicted and a trial date is set. Frank's counsel finds out what facts the prosecution has and instructs Frank not to talk to anyone unless counsel is present.

When Alice is questioned during the trial, she falters in her testimony and seems afraid to speak in Frank's presence. The judge can opt to have her testify via closed-circuit TV. The defense strongly objects to this idea.

Frank is convicted; he will be sentenced in a separate proceeding.

3. Distribute the Student Handout. Review these terms: *Miranda* rights, writ of habeas corpus, double jeopardy, due process of law, and bail. Then discuss how each right helps protect those accused and tried for crimes.

4. Divide the class into small discussion groups. Explain that students will use the handout as a springboard for discussing the following issues related to the hypothetical murder case.

- The police have no search warrant, and they do not have enough cause to search the bag. When one officer nudges the bag open, he sees a doll that he suspects was Becky's. Have the police legally found this evidence? Were they legally able to seize the bag and place it in evidence? Can they use it as evidence at the trial?
- The police have read Frank his *Miranda* rights. Frank does not ask for a lawyer. The police continue to question him, but Frank refuses to talk to them. Can the police force Frank to talk to them? Does Frank have the right to refuse to talk?
- Would allowing Alice to testify via closed-circuit TV violate any of Frank's rights? Why or why not?
- A police officer admits that he lied when he told Frank that Hector accused Frank of the crime. Frank made an incriminating statement after he was told this. He said that he was tricked into confessing. Did the police officer's lying violate Frank's rights? Why or why not?
- Because of pretrial publicity, Frank's trial was held in a neighboring county rather than his own. Did moving his trial to a different county violate Frank's rights? Why or why not?
- If Frank had been found not guilty of the crime, could he be tried again for the same crime at a later time? Why or why not?

5. Ask a member of each group to present the findings of the group. If a legal adviser is present, ask the adviser to clarify the law following the group reports.

Student Handout

Constitutional Rights of the Accused

Discuss the following rights of those accused of and tried for crimes. Then use the numbers from each of these 14 principal constitutional rights to rank the rights from most important to least important.

1. A person being held in custody has the right to obtain a writ of habeas corpus, a written order demanding that he or she be taken to court where the reason for holding him or her is given. (Article I, Section 9, Clause 2)

Most Important Right

2. Authorities cannot search for and take evidence or arrest someone in an unreasonable manner. In most cases, search and arrest warrants are required. (Fourth Amendment) _____

3. No one has to stand trial in a federal court unless a grand jury has indicted, or formally accused, him or her of a crime. (Fifth Amendment) _____

4. A person who is found not guilty of a crime cannot be put in double jeopardy, or tried again for the same crime. (Fifth Amendment) _____

5. A person cannot be forced to testify against himself or herself. (Fifth Amendment) _____

6. A person's life, liberty, or property cannot be taken without due process of law. (Fifth and Fourteenth Amendments) _____

7. The accused has the right to a speedy and public trial. (Sixth Amendment) _____

8. The accused has the right to a trial by an impartial jury. (Sixth Amendment) _____

9. The accused must be informed about the charges against him or her. (Sixth Amendment) _____

10. The accused has the right to question witnesses testifying against him or her. (Sixth Amendment) _____

Least Important Right

11. The accused has the right to call witnesses to testify in his or her favor. (Sixth Amendment)

12. The accused has the right to a defense lawyer. (Sixth Amendment)

13. The bail that the accused can post must be fair. (Eighth Amendment)

14. A person convicted of a crime cannot be given cruel and unusual punishments. (Eighth Amendment)

Which right did you rank as most important? Why? Which did you rank as least important? Why?

_____

_____

Seeking Justice in Federal Sentencing

Reforms designed to ensure uniformity, predictability, and honesty

Donald A. Purdy Jr.

Update on Law-Related Education, 21.2, 1997, pp. 31–35. © 1997 American Bar Association.

Almost 10 years ago, the United States criminal justice system experienced dramatic sentencing reform that represented one of the most historic, though little publicized, developments in the 200-year history of this country's legal system. Several years earlier, Congress set in motion these historic developments when it overwhelmingly voted for sentencing reform by passing the Comprehensive Crime Control Act of 1984, which established the United States Sentencing Commission. The main elements of the reform were designed to ensure truth in sentencing, predictability and proportionality in sentencing outcomes, the reduction of unwarranted disparity, and greater fairness in sentencing generally (Title 28 U.S.C. § 991[b]).

Justice for the defendant, the victim, and society is the ultimate goal.

Parole Abolition

Congress sought to promote truth in sentencing by mandating that the implementation of guideline sentencing would be accompanied by the abolition of parole on the federal level. The parole system had permitted the U.S. Parole Commission to release defendants after they served as little as one-third of their sentence—depending on the perception of their progress at rehabilitation and prospects for success as law-abiding citizens after release. Many citizens and too many elected officials do not know that parole was abolished in the federal system almost 10 years ago. Under the regime of guideline sentencing in the federal system, the judge, the defendant, and the public are assured that each defendant actually serves the duration of the sentence, reducible by a maximum of only 54 days per year for good behavior in the prison system (18 U.S.C. § 3624[b][1]).

Guidelines Background

The Sentencing Commission's directive was to define sentencing policies and practices that meet the four purposes of sentencing—deterrence, just punishment for an offense, incapacitation, and rehabilitation. The commission was also charged to reduce unwarranted disparity; to ensure that the 40,000 or more federal sentences each year would be more certain, fair, effective, and honest; and to make judges, prosecutors, and Congress more accountable for the sentences that offenders in the federal system receive. The sentencing guidelines developed by the commission embody the basic philosophy that the purpose of sentencing is to punish the offender, to deter future crimes by the offender and others, and to protect the public. Justice for the defendant, the victim, and society is the ultimate goal.

No longer would a sentence in the federal system be determined by the luck of the draw as to which judge is assigned to handle the case.

In mandating the creation of the Sentencing Commission, Congress acknowledged that unwarranted disparity in sentencing was undermining the fairness and effectiveness of the criminal justice system. It charged the commission with developing sentencing guidelines that would ensure that similar offenders who commit similar offenses receive substantially similar sentences. No longer would a sentence in the federal system be determined by the luck of the draw as to which judge is assigned to handle the case. This reform was to be achieved through guidelines that specify what facts or factors in a given case will result in a specified increase in the applicable sentencing range. This system structures the sentencing discretion of judges, which was previously limited only by the maximum period of incarceration allowed by the statute of conviction. Now, federal sentencing is structured so that similar

Donald A. Purdy Jr. is the chief deputy general counsel of the United States Sentencing Commission in Washington, D.C. His comments are his own and do not necessarily represent the opinions of the Sentencing Commission.

defendants have similar factors applied to determine the sentencing range in which the judge must impose the sentence (18 U.S.C. § 3553[a]). Significantly, however, a judge who finds the presence of a factor that the commission has not adequately considered may depart from the range but must give reasons for doing so (18 U.S.C. § 3553[b]).

The Sentencing Commission created sentencing guidelines with established ranges for offenses and for different categories of offenders. The guidelines manual provides the analysis in specific cases that directs the user to the appropriate place on a sentencing grid, called the Sentencing Table. The grid has 43 levels of offense seriousness and six criminal history categories based on the offender's record of criminal convictions. Each level represents an approximate increase of 12.5 percent. The intersection point of the two axes provides a sentencing range with a maximum term of imprisonment that cannot exceed the minimum by more than the greater of 25 percent or six months (18 U.S.C. § 994[b][2]). For the least serious offenses and offenders, the Sentencing Table also provides ranges that include the possibility of alternatives to incarceration, such as straight probation, community confinement (such as a halfway house), and home detention.

An important feature of the Sentencing Reform Act was expanded appeal rights in the sentencing arena. The act provided that the defendant and the government can appeal the court's findings of fact and application of the guidelines to the facts, as well as the decision of the court to depart from the applicable sentencing range in an atypical case (18 U.S.C. § 3742[a] and [b]).

An important feature of the Sentencing Reform Act was expanded appeal rights in the sentencing arena.

How the Guidelines Work

To understand how the guidelines work, you may find it useful to look at two common offenses: bank robbery and drug trafficking. In fiscal year 1995, the United States federal courts sentenced 1,603 bank robbery cases, which accounted for 4.2 percent of federal cases. There were 14,183 drug trafficking cases, which accounted for 37 percent of cases (U.S. Sentencing Commission, *Annual Report* 1995). Guideline application generally begins with the statute of conviction. For bank robbery, the statute is Title 18 U.S.C. 2113. The Statutory Index refers violations of Section 2113 to guideline 2B3.1 in Chapter 2. It identifies a base offense level (level 20) as the starting point for all convicted of robbery. A number of specific offense characteristics leads to increases from the base offense level, based on the facts of the case. These include whether the offense involved a financial institution (two levels), a weapon (potential increases range from three to seven levels depending on its use), bodily injury (from two to six levels), physical restraint or abduction (two or four levels, respectively), theft of a firearm or controlled substance (two levels), and the amount of money taken (loss amounts of $10,000 to over $5 million result in increases of from one to seven levels). If a victim was killed under circumstances that would constitute murder, the user of the manual is cross-referenced to the guideline for murder (§ 2A1.1), which provides for a level 43, the offense level of the highest seriousness. So, for example, if a defendant robs a bank (level 20 plus two) with a gun that he or she displays (plus three), and takes $15,000 (plus one), his or her offense level from Chapter Two is level 26.

To determine the final offense level, the user proceeds to Chapter Three. It contains adjustments that must be applied if certain facts exist in the case. Levels are affected when the case involves a hate crime or a vulnerable victim (add three or two levels, respectively), an official victim (add three), restraint of the victim (add two), international terrorism (add 12, but no less than level 32), an offender who played a more or less serious role in the offense (add or reduce two to four levels as appropriate), abuse of a position of trust (add two), use of a minor to commit the offense (add two), obstruction of justice (add two), reckless endangerment during flight (add two), multiple counts of conviction (follow the rules to provide incremental punishment for significant additional harm), or the defendant's acceptance of responsibility (reduce two or three levels as appropriate).

In our bank robbery example, if the offender acted alone, pleads guilty, and accepts responsibility for the offense (assume a three-level reduction), the offense level based on Chapters Two and Three is a level 23.

Once the user determines the offense level from Chapters Two and Three, the user refers to Chapter Four to determine the offender's criminal history category (I through VI) based on the type and recency of prior convictions. Generally, the criminal history category is determined by the number of points resulting from the lengths of sentences for prior convictions. One of the most significant potential overrides of this system is the career offender guideline (§ 4B1.1). It provides for sentences at or near the statutory maximum if the offender is being sentenced for committing a crime of violence or a controlled substance offense after having sustained two prior convictions for similar offenses.

Thus, in our bank robbery example, assuming there are no other adjustments and no criminal history, the defendant would face a level 23 sentence. This sentence has a range of 46 to 57 months.

By contrast, drug trafficking offenders face the same Chapters Three and Four analysis as bank robbers, but drug traffickers have their own Chapter Two guideline (§ 2D1.1). This guideline has three potential base offense levels. Most cases are sentenced with a level derived from a drug table that assigns an offense level based on the quantity of drugs the offender is held responsible for. For example, if someone distributed between five and 15 kilograms of cocaine, the base level is 32; if between two and 3.5 kilograms, level 28; if between 200 and 300 grams, level 20; and so forth.

The two much rarer base offense level options are level 38 and level 43. If the defendant committed a specified offense, and a death or serious bodily injury resulted from the use of the substance, a level 38 is assigned. A level 43 is assigned if the same conditions apply, but the defendant committed the offense having sustained after one or more prior convictions for a similar offense.

Once the base offense level is determined, the court determines if any of the following were applicable in the case: a dangerous weapon was possessed (add two levels); the defendant unlawfully imported the substance, imported the substance using an aircraft that was not a regularly scheduled commercial air carrier, or acted as a pilot or in a related capacity (add two, but no less than level 26); the object of the offense was distribution in a prison or similar facility (add two); and the defendant meets certain statutory requirements for lesser punishment as a first-time nonviolent offender (if the level determined previously is above level 26, reduce by two levels). Again, if a victim was killed as detailed in the bank robbery example, the user proceeds to the murder guideline.

So a defendant with 350 grams of cocaine has a base offense level of 22. If a gun is possessed in connection with the offense, the level is increased to level 24. If no other adjustments apply and there is no criminal history, the defendant faces a range of 51 to 63 months. If that same defendant pleads guilty, accepts responsibility, and qualifies for the three-level reduction, the applicable sentencing range is 37 to 46 months.

Whence the Numbers

As a starting point for drafting the offense levels and sentencing ranges, the commission analyzed 10,000 actual pre-guideline cases to identify the factual circumstances that most often affected sentencing decisions and by how much (USSG, Ch. 1, Pt. A). It also examined the sentences and relevant factors spelled out in congressional statutes, such as those for drug offenders, career offenders, and offenders who make their livelihood from crime, as well as parole guidelines and analogous sources.

The guidelines, for the most part, set punishment levels modeled on pre-guideline practice. In addition, however, the commission structured the guidelines to provide tougher sentences for certain offenses, in particular, violent crimes against the person, drug offenses, and some white collar crimes (U.S. Sentencing Commission, *Supplementary Report* 1987). For some white collar offenses, the guidelines require at least a short prison sentence partly to send a more effective message against criminal conduct—that crime does not pay and will be punished. This change reflects the commission's efforts to rationalize existing sentences by treating white collar fraud offenders as severely as blue collar theft offenders. It also reflects the view that short but definite terms of confinement will help deter such crimes as tax evasion, price fixing, and insider trading. It is the existence of non-prison confinement conditions and the option of intermittent confinement that most significantly change present probationary practice. Accordingly, it was expected that the percentage of all offenders who receive sentences requiring no prison time whatsoever would drop from 41.4 percent to 18.5 percent under the guidelines. According to data from fiscal year 1995, 13.6 percent of all offenders received straight probation, 7.8 percent received probation with some confinement, and 4.4 percent received prison with some community confinement (Sentencing Commission, *Annual Report* 1995). Many offenders who before the guidelines were sentenced to probation would receive a "taste of jail" under the guidelines. The offenders would be required to serve short sentences or to spend nights and weekends for one to six months in a halfway house or community-based facility. This change reflected in part the commission's view that short but certain terms of confinement will increase deterrence.

For selected more serious offenses, the guidelines would result in significant increases in the terms of imprisonment actually served (Sentencing Commission, *Supplementary Report* 1987). For example, for persons convicted of violent offenses, such as homicide, rape, and kidnapping, the average sentence was 37.7 months before the guidelines were established. Under the guidelines, predictions were that these same offenders would serve an average of 75.2 months. Data for 1995 show that the average sentence actually is 85.6 months (median: 59.5 months). (Sentence lengths in 1995 assume the maximum 15 percent reduction for good behavior.) Before use of the guidelines, persons convicted of robbery served an average of 44.8 months. Under the guidelines, predictions were that these same offenders would serve an average of 75.4 months. Data for 1995 show an average of 92.2 months under the guidelines (median: 66.3 months). Persons convicted of drug offenses previously served an average of 23.1 months. The implementation of the

Anti-Drug Abuse Act and the guidelines were expected to increase that average to 57.7 months. Data for 1995 show an average of 76.2 months (median: 51 months).

In the area of white collar crime, for example, fraud and income tax violations, it was anticipated that there would be a dramatic decrease in the percentage of defendants whose sentences would include no prison time at all. Of those convicted of fraud before the guidelines, 59 percent served no prison time. Under the guidelines, projections were that the number would be reduced to 24 percent. Data for 1995 show that under the guidelines 22.3 percent of fraud offenders receive straight probation and 15.5 percent receive probation and some confinement. Previously persons convicted of tax evasion, tax fraud, and criminal tax violations had a better-than-50:50 chance of being sentenced to no prison time at all (57 percent). Under the guidelines, projections were that the number would be reduced to 3 percent. Data for 1995 show that 28.6 percent of tax offenders actually receive probation and 35.3 percent receive probation and some confinement. Moreover, the average length of prison time actually served by those sentenced to prison for tax evasion or tax violations was expected to double under the new guidelines. Based on 1995 data, the average sentence for tax offenders is 12.7 months (median: 10.2 months) (Sentencing Commission, *Annual Report* 1995). In addition, under the guidelines, any defendant who is financially able is required to pay the costs involved in connection with his or her imprisonment or probation. Thus, the guidelines were meant to advance not only justice, but fiscal responsibility as well.

Pre-guideline Sentencing Disparity

Supporting some of the findings that contributed to the passage of the Sentencing Reform Act, the commission's empirical research revealed that unwarranted and unjustified disparity was, indeed, a troublesome and unjust reality in the federal system before the guidelines. While accepting the congressional decision as to the existence of unwarranted disparity as a given, the commission did its own study of disparity. It selected for analysis four offense categories—980 bank robbery cases, 562 fraud cases, 650 bank embezzlement cases, and 1,010 heroin distribution and/or importation cases. These are among the most frequently prosecuted crimes in the federal criminal justice system. The commission examined sentence variation in time served (after the Parole Commission exercised its will) and in the decision to impose prison at all, variation in sentence length among those sent to prison, and variation in the range of sentences that offenders convicted of the same type of crime received. The commission concluded that there was significant unwarranted disparity in sentencing before the guidelines, particularly with respect to race, sex, and geographic region.

The commission concluded that there was significant unwarranted disparity in sentencing before the guidelines, particularly with respect to race, sex, and geographic region.

Simplicity vs. Complexity

One of the most important practical issues the commission had to resolve in developing a system of guideline sentencing was striking a balance between complexity and simplicity (Sentencing Commission, *Supplementary Report* 1987). A system that mandated a particular sentence for anyone who committed a particular offense would be simple and easy to apply. However, without taking into account the specific aggravating or mitigating facts of the offense and the criminal background of the defendant, the system would not be efficient or just.

A guideline system had to be sophisticated enough to distinguish between offenders who violate the same statutory offense but in significantly different ways. A guideline system that fails to recognize such distinctions would unfairly lump together dissimilar offenders. Significantly different ways of committing the same crime should be recognized at sentencing. It is true that disparity would be reduced under such a system, but only at the expense of great unfairness.

A complex system, on the other hand, would have the great virtue of being able to precisely distinguish offenders by taking into account numerous characteristics that arguably may be relevant in the sentencing decision. While increasing the potential for fairness, such a system suffers the great drawback of being so complex that it is virtually impossible to formulate and unworkable and ineffective in practice. The commission attempted to strike an appropriate balance between these competing concerns to achieve the ends envisioned by Congress. In doing so, the commission has structured and limited, but not eliminated, the discretion that judges exercise in sentencing.

Is the System Unfair?

Some decry the fact that the guidelines appear so mechanical, that judges have to sentence "by the numbers" rather than based on the individuals before them. The guidelines do not require sentencing by calculator or computer. At their most basic, the guidelines list the important factors that will warrant a specified increase in the applicable sentencing range. They ensure that similar offenders who commit similar offenses will receive similar sentences. For example, every bank robber faces at least a level 22 (a range of

41 to 51 months for the offender with no other adjustments and the least serious record of criminal convictions). The seriousness of every bank robber's offense will be judged using the same factors, such as weapon use, injury caused, and amount of money taken. A bank robber who displays a gun will face a two-level increase (about 25 percent) in the offense seriousness rating, resulting in a range of 63 to 78 months. That increase applies regardless of the race or gender of the defendant or how seriously that judge views bank robberies involving firearms. Similarly, the guidelines treat the criminal history of every defendant by the same rules, not leaving it to the personal perspective of each judge to determine how much to increase the sentence of a repeat offender.

What about the special facts of the particular case or the unique background of the defendant being sentenced? First, in a typical case, the judge can weigh the significance of those realities in deciding where to sentence within the applicable range. Second, if the judge finds that the case is an atypical one, not adequately considered by the commission, he or she has the power to depart from the guidelines accordingly. But the judge cannot depart just because he or she does not think bank robberies are as serious as the Sentencing Commission has determined.

Think about how this system compares with the pre-guideline system. A judge could impose any sentence from probation to the statutory maximum based on that judge's perception of the seriousness of the conduct, the criminal record, and the likelihood that the defendant would commit a crime in the future. The judge did not have to give reasons for the sentencing decision, and the defendant would have virtually no recourse on appeal.

How did the public view the pre-guideline system? They knew that different offenders got different sentences for the same crime; that offenders served only a fraction of the sentence imposed; and that sentences varied based on the judge, the caliber of the defense attorney, and disparate and lenient plea-bargaining practices. Can it really be argued that the guidelines represent a step backward compared to the old system?

Some decry the fact that the guidelines factor in uncharged conduct in determining the sentencing range for certain kinds of offenses or that a judge may use such conduct in deciding whether or not to depart from the range. Such critics forget that under the old system a judge could include such information without saying so or even while specifically saying it was not being used. Now, at least, defendants can know when it is being used, challenge its accuracy or improper use, and have some appeal rights. And the same factors apply to all offenders who commit the same crimes. Is this not also an increase in fairness?

Accountability

On a broader note, guideline sentencing and the work of the commission in tracking sentencing practice have a major beneficial impact on our criminal justice system. They make judges, prosecutors, and Congress more accountable and make it easier for everyone to track the success or failure of our nation's sentencing practices for federal offenses. Before the guidelines, it was much more difficult to track federal sentencing practice, and examples of extreme cases of abuse were blamed on the judge who imposed a sentence or on the prosecutor who negotiated a plea agreement rather than on the system where the blame often belonged.

Through the work of the Sentencing Commission, the public has much better access to good information about how different crimes are punished in this country, and individual plea-bargaining and sentencing decisions can be evaluated in that light. In addition, if someone feels that important factors are ignored or offense levels are too lenient or too harsh, pressure can be brought to bear by any or all of the three branches of government or on the commission to change things. Accountability for sentencing practice is much more of a reality today.

Conclusion

Federal sentencing reform has changed the face of sentencing. The guideline system ensures that sentencing practice is no longer shrouded in mystery and that the players can be held accountable for how they deal with the system in individual cases. The guidelines set a standard against which charging and plea-bargaining practices and the imposition of sentences generally can be judged. They ensure that similar offenders who commit similar offenses will receive similar sentences. Together with the other reforms, the current system has resulted in sentences that are more uniform and predictable and more honest and reviewable. This reform represents real progress.

Resources

Title 18 U.S.C. § 994(b).

Title 18 U.S.C. § 2113, guideline 2A1.1.

Title 18 U.S.C. § 2113, guideline 2B3.1 (USSG App. A.).

Title 18 U.S.C. § 3552(b).

Title 18 U.S.C. § 3553(a).

Title 18 U.S.C. § 3624(b)(1).

Title 18 U.S.C. § 3742(a) and (b).

Title 28 U.S.C. § 991(b).

U.S. Sentencing Commission, *Annual Report*, Table 10, 43; Table 18, 60, 1995.

U.S. Sentencing Commission, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements*, June 18, 1987. ◆

Corrections, the Public Safety, and Offenders' Needs

Controlling criminals in ways that help them achieve lifelong reform

J. Michael Quinlan

Update on Law-Related Education, 21.2, 1997, pp. 36–38. © 1997 American Bar Association.

The job of corrections is to carry out judges' sentences in a way that protects the public—keeping criminals under control in various ways until their sentences have been served. *Corrections* can mean many things, but when most people hear the word *corrections*, they think about a prison in a remote area surrounded by high walls or fences. In fact, though, that type of facility is just one of five major parts of corrections—jails, community corrections, probation, prisons, and parole—all of which make up a comprehensive system for ensuring public safety.

Jails, community corrections, probation, prisons, and parole—all ... make up a comprehensive system for ensuring public safety.

1. Jails generally are located in large cities and county seats. They hold prisoners who are waiting for the courts to handle their cases after they are first arrested or those who are serving relatively short sentences for misdemeanor offenses.

2. Community corrections refers to a wide variety of punishment and treatment programs that are located in the offender's community instead of in a distant prison. Community corrections programs provide facilities, called "halfway houses" or "community correctional centers," that make it possible for offenders to keep their jobs and stay close to their families while they serve their sentences. These facilities are not as secure as a jail or prison, so the offenders assigned to community corrections facilities are screened to be sure that they do not present a risk to the community.

3. Probation is a type of community supervision used when offenders do not need to be in a community corrections program or a prison. Probation officers supervise the offenders on a regular basis—making home visits, checking on them where they work, and being sure they participate in any required programs, such as drug counseling programs.

4. Three general types of prisons are maximum-security prisons, medium-security prisons, and the minimum-security prison camps—including correctional boot camp programs, which combine military boot camp activities with educational and substance-abuse programs. An offender's background and crime determines the type of facility to which he or she is assigned. Those requiring the most supervision and control or presenting the most risk to the public go to more secure prisons, and those presenting the least risk go to minimum-security facilities.

5. Parole is a type of community supervision, similar to probation, that is used after prisoners are released from prison. An assigned parole officer oversees an offender's home and job situations, as well as any drug counseling or other supervision requirements.

According to the U.S. Department of Justice Bureau of Justice Statistics, the number of persons under correctional supervision in the United States is approximately five million. About 1.1 million are in adult prisons and another 500,000 are in jails. The rest—about 3.4 million—are in probation or parole programs or are serving sentences in the community.

U.S. Corrections at a Glance

Correctional systems in the United States are operated by federal, state, and local governments, and the way an offender is processed by the criminal justice system depends on whether Congress, a state legislature, or a city or county passed the law that was violated. Offenders convicted of federal crimes are handled by federal agencies such as the Bureau of Prisons and the U.S. Probation Service. States gener-

J. Michael Quinlan is former director of the Federal Bureau of Prisons in Nashville, Tennessee, and a member of the Corrections and Sentencing Committee of the American Bar Association. Mr. Quinlan lives in Springfield, Virginia.

ally have a department of corrections that manages prisons and a state probation and parole division that manages offenders in the community. At the local level, jails and community programs are used for misdemeanor offenders and other offenders with relatively short sentences. Some states and local jurisdictions, as well as the federal government, also send offenders to prisons, community corrections facilities, and treatment programs operated by private companies.

A network of agencies, institutions, and programs protects the public from criminal conduct, and, indeed, public safety is a central concern of correctional agencies. For that reason, most correctional agencies have an elaborate inmate classification system to help determine the type of institution to which an offender should be sent. Appropriate staff levels, building design, and operating procedures are used to be sure that inmates cannot escape and that the risk of assault or other incidents is kept to a minimum.

The level of government control and involvement in the correctional process varies in line with the needs of the offender.

The level of government control and involvement in the correctional process varies in line with the needs of the offender. Those in probation, parole, and community corrections programs are responsible for carrying out many aspects of their own personal lives. But in jails and prisons, inmates are provided meals, work, medical/dental care, and basic activities as part of daily institutional life. Most prisons also offer offenders an opportunity to improve their educational level and job skills and to participate in drug and alcohol treatment programs.

Making programs available in prisons is a wise public policy that is required by law. It keeps inmates productively occupied. It motivates them to good behavior. And, perhaps most importantly, it provides a chance to correct the problems that may have brought them into the correctional system in the first place. There is a long-term benefit to society when offenders reform and live law-abiding lives.

Actually, the field of corrections reflects to a large extent what is going on in American society. When most people think about crime, they have views shaped by the acts reported most frequently in television news or on the front pages of newspapers—serious violent crimes. So, many think that the crime problem in America is a violent one. Fortunately, only 12 percent of all crimes are in that category; and in fact, over the past several years, violent crime has been declining except among juveniles. The vast majority of crimes are nonviolent crimes involving drugs and alcohol. That most crimes are nonviolent is important because building and running prisons is very expensive, and only those offenders who really are threats to others or who commit very serious or numerous repeat crimes should be sent to prison. Many nonviolent criminals do not need to go to prison; community corrections and probation are very effective—and far less expensive—in handling them. Unfortunately, many states and local government organizations do not have enough community-based resources, and so they use expensive prison placement instead.

Prison crowding creates problems because finding enough meaningful jobs for inmates is difficult, and the space for needed educational and vocational training programs becomes limited. If prisoners are not kept busy, many problems can arise. Without the opportunity to learn skills, some offenders are less likely to be successful when they return to their home communities. Statistics show that about 99 percent of prison inmates will eventually be released, and giving them the opportunity to be more employable and to have necessary social skills can help them stay on a noncriminal path when they are released.

Correctional Costs

Even though it is a necessary and important government function, corrections is a costly part of American life. According to the 1996 *Corrections Yearbook*, government agencies spent $27.6 billion on correctional activities in fiscal year 1995. The average total daily cost for confining one inmate in an adult correctional facility is $53.85, or about $20,000 per year. Keeping an offender in a community correctional facility or on probation or parole costs substantially less.

The overall cost of corrections has been rising rapidly over the past 15 years—mainly because more and more people are being prosecuted for drug crimes, and the sentences for convicted drug offenders have increased in length. As a result, the national prison population has increased from 400,000 in 1980 to over 1.1 million today. The nation's prison capacity has been expanded during this time—hundreds of new prisons have been built. But the overall level of crowding is still high in most prisons, and growth in prison populations has meant that there are tremendous costs in operating a prison system.

Myths About Prisons

There are many incorrect myths about prisons, two of which are particularly important to correct. Movies and television portray inmates as being locked in their cells 24 hours a day. However, most prisoners—even those in high-security prisons—are able to move more or less freely inside the walls or fences during daylight hours. The level of freedom of movement within

a prison generally is matched to the security level of offenders within the prison. Higher-security inmates have less freedom, while lower-risk inmates have more. The principle involved is that only the amount of restriction needed to ensure public safety and the safety of staff and other inmates is applied.

The second myth is that if a prisoner is released from prison and commits another crime—recidivism—the criminal justice system somehow has failed. What this view does not fully consider is that rehabilitation involves a three-part concept. The first part is the responsibility of the correctional staff to provide opportunities for offenders to improve themselves through education, drug treatment, vocational training, and work experiences. The second part is the community's responsibility to assist offenders through volunteer programs, as mentors, role models, or advisers to ex-offenders. Without community support, it is virtually impossible for a former offender to successfully return to the community. The third part is the offender's own desire to change in a positive way. Without that, no correctional program or community effort can keep an offender from returning to a life of crime. The offender's desire to change is the key element. Without it, there will be no rehabilitation and no reduction in recidivism.

Some people think prisoners have too many rights; others argue they have too few.

Prisoner Rights

Some people think prisoners have too many rights; others argue they have too few. However, it is generally agreed that prisoners have the following rights under the U.S. Constitution:

—The right to file complaints in writing with courts or the news media and to have access to legal materials.

—The right to have a due process hearing before major privileges are taken away.

—The right to adequate health care and nutrition.

—The right to exercise religious beliefs.

—The right to be free from cruel and unusual punishment.

Many of these rights are limited to some degree in prison. However, the courts have generally held that a prisoner's rights may be restricted only when necessary for the discipline, safety, and security of the institution.

Improvements in Corrections

One major recent improvement in corrections has been the availability of technology to monitor offenders who are serving sentences in the community. Electronic "bracelets" are used to limit a person's freedom to move, allowing development of "home confinement" programs. As a result, nondangerous offenders do not have to leave the community to serve a sentence. The costs for nonprison programs are much less than those for prison.

Future Issues

There is a growing demand for special programs to treat offenders with alcohol or drug addictions because as many as 70 percent of new inmates in some prisons have a substance-abuse problem. Providing treatment programs in prisons can be a major step in preventing future drug- and alcohol-related crimes.

To be effective, the corrections system must be maintained and improved to meet society's needs and offenders' needs within the corrections system.

The aging of the prison population is a major concern. Sentences have gotten longer in recent years, and changes such as the elimination of parole and the use of mandatory minimum sentences mean that offenders are serving more time. As inmates age, their health care needs increase. Statistics show that prisoners have a higher rate of medical problems and actually age more rapidly than the average person. If confinement trends continue, more medical resources will be needed to care for an aging prison population.

Surveys show that crime is one of the greatest concerns in our society. Unfortunately, however, some candidates for political office use an exaggerated or inaccurate view of the crime issue as a way of winning voter approval. Talking "tough on crime" without looking at the full range of costs and implications is shortsighted. In the extreme, it can have the effect of increasing the cost of operating the criminal justice system without really increasing public safety.

With an increased demand on criminal justice resources—and corrections, in particular—a significant need has developed for the recruitment of new correctional workers. Available positions include correctional officers, case managers, teachers, medical and food service personnel, administrative support staff, psychologists, probation and parole officers, counselors, and maintenance workers of all types. Positions in corrections are generally paid comparably to other law enforcement positions, and opportunities for promotion are excellent.

Corrections is an important and essential part of the criminal justice system. To be effective, the corrections system must be maintained and improved to meet society's needs and offenders' needs within the corrections system.

Resources

Criminal Justice Institute, Inc. *The Corrections Yearbook, 1996.*

"Prison and Jail Inmates 1995," *BJS Bulletin*, NCJ 161132 (August 1996).

♦

Teaching Strategy

Protecting Offenders' Rights

Mabel McKinney-Browning

Adapted from *On Trial in California,* American Bar Association, pp. 13–14. *Update on Law-Related Education,* 21.2, 1997, pp. 39–41. © 1997 American Bar Association.

Background

The Constitution includes several amendments that protect the rights of those accused and convicted of crimes, such as due process of the law, the right to defend oneself, and the freedom from double jeopardy. Many cases that the United States Supreme Court hears concern the possible violation of these rights. *Kansas v. Hendricks*, Docket Nos. 95-1649 and 95-9075, consolidated, is one such case that will be decided by the Supreme Court this year. In this case, the Court will consider whether a Kansas law violates the constitutional rights of a convicted offender.

Objectives

As a result of this lesson, students will

- Analyze the facts presented in a case study.
- Identify the important issues involved in the case.
- Draw conclusions about constitutional rights.
- Determine how they would decide the case.
- Evaluate the implications of their decisions.
- Explain the reasons for their decisions.

Target Group: Secondary
Time Needed: 2–3 classes
Materials Needed: Student Handouts 1 and 2, one each per student

Mabel McKinney-Browning is director of the ABA Division for Public Education.

Procedures

1. Briefly discuss the rights and freedoms guaranteed in the Constitution. Because this case involves Amendments 5 and 14, you may wish to focus on the meanings of these amendments. Read the following excerpts from the amendments and discuss their meanings with students.

Amendment 5

"... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law."

Amendment 14

"... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

2. Identify the process by which the Supreme Court decides cases. Explain that the Court decides a case after reviewing written and oral arguments. Decisions are made by a majority of the justices. The Court does not need a unanimous decision to decide cases.

3. Explain that students will analyze a case to determine whether a state law violates the constitutional rights of a convicted offender. Distribute copies of Student Handouts 1 and 2 to each student. The handouts are a case study and a case study worksheet.

4. Have students carefully read the case study, using the worksheet as a guide.

5. When students have completed their worksheet, use the following questions to guide discussion of the case:

- What are the facts in this case?
- Which facts are most important?
- What are the issues in this case?
- Which issues are most important?
- Are any rights in conflict in the case?

6. Divide the class into groups of three or five students. Explain that the groups are to discuss the case and to make a decision. During the discussion, group members should consider the rights involved in the case and whether those rights have been violated. If rights are in conflict with one another, students should determine which rights take precedence. For example, does the public's right to be safe and secure outweigh the individual's right to personal freedom?

7. Ask each group to write a short opinion paper. The group should provide the following information in the paper: the decision, the reasons for the decision, the likely results of the decision for those involved in the case, and the impact the decision could have on society.

8. Have each group select a member to give a brief oral presentation of the opinion paper to the class. Allow a five-minute question-and-answer period after each presentation.

9. Conclude the activity by having the class compare and discuss the decisions and their implications.

Student Handout 1

Case Study Worksheet

Facts

- What are the facts in this case? (List on a separate sheet of paper.)
- Now look carefully at each fact you have identified. List the appropriate "facts" under each category.

1. Which facts in this case are facts that cannot be questioned?

_____

_____

2. Which facts in the case are suggested by other facts, but are not actually stated?

_____

_____

3. What else do you need to know? List the facts that are missing from the case.

_____

_____

4. Which facts will be most important in deciding the outcome of this case?

_____

_____

Issues

1. Who is involved in this case? _____

_____

2. What does each person/group involved want to happen?

_____

3. What is the most important issue in this case?

_____

_____

Decision

1. How would you judge this case? Circle at least one.
   - Declare the state law constitutional.
   - Declare the state law unconstitutional.
   - Support the prisoner's rights as involved in this case only.
2. Explain your reasons for making this decision.

_____

_____

3. Given your decision, describe what will happen as a result of the case.

_____

_____

Student Handout 2

Prisoner's Rights

Kansas v. Hendricks

Docket Nos. 95-1649 and 95-9075, Consolidated

Facts

Leroy Hendricks is a criminal who preys on children. Over a 30-year period, he was convicted five times for molesting children.

Hendricks was most recently convicted in 1984 by the State of Kansas for molesting two 13-year-old boys. After he completed his prison term for that conviction, Kansas used a 1994 law to place Hendricks in a mental institution as a mentally abnormal and dangerous person. Since then, Hendricks has challenged the Kansas Sexually Violent Predator Act. The United States Supreme Court has been asked to decide whether the act violates the Constitution's prohibition against ex post facto laws. Ex post facto laws prohibit states from imposing a punishment for a past crime that is greater than the punishment was at the time the crime was committed. The Court must also decide whether the state law violates the protection against double jeopardy (punishing a person twice for the same crime).

In 1994, the Kansas legislature passed the Sexually Violent Predator Act. This statute permits the civil confinement of any sexually violent predators.

After Hendricks served his prison sentence, he was confined in a mental institution as a sexually violent predator under the new statute. At the commitment hearing, Hendricks admitted that he could not resist the urge to engage in sexual acts with children. A psychologist testified that Hendricks was mentally abnormal, but not mentally ill.

Case Analysis

The question presented is whether the confinement is punishment. If it is not, Hendricks's ex post facto and double jeopardy claims cannot be supported.

Kansas argued that Hendricks is being provided treatment and the public is being protected from future offenses. Hendricks argued that he has received little or no treatment and that the statute merely provides a means to punish sex offenders after they have served their prison sentences. Hendricks wanted the Supreme Court to determine whether the law was warranted by a compelling state interest and was the least restrictive means of furthering the state's objectives because it deprived him of his right to physical liberty.

Kansas said that the predator statute should be declared valid because it furthers compelling public interests by treating dangerous sex offenders while protecting the public from them.

Significance

This may be an important decision on the part of the Court. Kansas has argued that its statute meets the two requirements for confinement in a mental institution: mental illness and dangerousness. Illness and abnormality should not be distinguished, according to the state—to do so would deprive states of a crime-fighting tool that is necessary to protect the public from sexually violent predators whose criminal sentences have expired.

On the other hand, if the Court concludes that mental abnormality and dangerousness are reasons for confinement, more persons may be committed to mental institutions even though they are not mentally ill.

Adapted from Preview of U.S. Supreme Court Cases, *no. 3 (November 18, 1996): 166–170.*

Death Penalty in America

Risks, statutory protections, and constitutional rights

Amie L. Clifford

Update on Law-Related Education, 21.2, 1997, pp. 42–45. © 1997 American Bar Association

The death penalty has been used as punishment for certain criminal acts since the beginning of civilization. Its use in America began in the 13 original English Colonies. When the English came to America, they brought the English Penal Code with them. That code provided for the use of the death penalty as punishment for a number of crimes including witchcraft, blasphemy, treason, adultery, and murder. Not all of the colonies imposed the death penalty as punishment for every crime designated as punishable by death in the Penal Code, but all used it as punishment for murder. Since colonial times, this country has used the death penalty as a form of punishment. However, the executions of condemned prisoners have been suspended during certain periods of time.

In the late 1960s and early 1970s, the states voluntarily ceased executing inmates on death row. The suspension of executions—referred to as a "moratorium"—was in response to constitutional challenges to the death penalty. A number of death penalty cases in which defendants were challenging the constitutionality of the laws under which they were sentenced were pending before the United States Supreme Court. In 1972, the Supreme Court issued a landmark decision in *Furman v. Georgia*, 408 U.S. 238 (1972). In *Furman*, the Court did not hold that the infliction of the death penalty automatically violated the Constitution's prohibition against cruel and unusual punishment. The Court did hold, however, that because of its uniqueness, the death penalty could not be imposed under circumstances in which a substantial risk of an arbitrary and capricious manner of sentencing existed. The decision of the Court resulted in all death penalty laws being set aside as unconstitutional. Within 18 months, 23 states either amended existing death penalty laws or created new laws reinstating the death penalty by following the Supreme Court's guidelines in *Furman*. Beginning in 1976, the U.S. Supreme Court upheld the constitutionality of the revised laws. From 1976 until 1994, 4,557 persons were sentenced to death. Of that number, 2,336 (51 percent) were white, 1,838 (40 percent) were African American, 316 (7 percent) were Hispanic, and 67 (2 percent) were of other races. Of those sentenced to death during that period, 257 persons were executed and 1,790 had their death sentences set aside.

As of December 31, 1994, the death penalty was available as a form of punishment in 37 states and under federal law. While all jurisdictions that have the death penalty allow it to be applied in murder cases, some also have made it an option for other crimes, such as treason, kidnapping, and aircraft piracy. Crimes for which death is a possible sentence are referred to as "capital crimes."

It should be noted that not all homicides, or unlawful killings, are classified as murder. The definition of *murder* differs from state to state. In states in which the death penalty is a possible punishment for murder, not all murders may qualify. For example, some states authorize the death penalty in first-degree murder cases or felony murder cases, whereas other states authorize it only in murder cases with aggravating circumstances. An aggravating circumstance is a circumstance surrounding the instant murder or the defendant that is so extreme that death is an available punishment. Aggravating circumstances are usually established by state legislatures and set out in the law. Examples of common aggravating circumstances are murders committed in the course of an armed robbery, murders committed in the course of a rape, a defendant with a prior murder conviction, and murders of a law enforcement officer.

Statistics

By the end of 1994, prisons held 2,890 defendants under sentence of death for capital crimes. By the end of 1994, these inmates had been on death row for an average of 6.3 years each. On death row were 1,645 white inmates, 1,197 African Americans, 23 Native Americans, 17 Asian Americans, and

Amie L. Clifford is an assistant solicitor in Charleston, South Carolina, where she prosecutes felony and misdemeanor cases, including murder, rape, armed robbery, and drug cases. She serves as a member of the Executive Council of the ABA Criminal Justice Section and as the ABA Young Lawyer Division's liaison to the ABA Standing Committee on Continuing Education of the Bar. Ms. Clifford is also a past chair of the South Carolina Bar Criminal Law Section.

eight inmates of other races. Texas had the largest number of death row inmates, 394, followed by California, 381; Florida, 342; and Pennsylvania, 182. On death row were 1,810 (67.1 percent) prisoners who had been previously convicted of felony crimes and 243 (8.6 percent) who had been previously convicted of an unlawful killing. Of those for whom information about age at the time of sentencing was available, 957 (38.8 percent) were under 25 years old when sentenced to death. Although 16 states allow persons under the age of 18 to be sentenced to death, only two states allow persons as young as 14 years old to be so sentenced.

During 1994, 13 states executed a total of 31 inmates; those inmates had been on death row for an average of 10 years and two months. During that same year, 304 defendants were sentenced to death in 26 states, and 100 defendants had their death sentences set aside.

Lethal injection is currently the most common method of execution. Other methods in use in 1994 were electrocution, lethal gas, hanging, and firing squad.

Unique Trial Procedures

Before a state can bring a person to trial on a capital charge, the State must notify the accused of its intention to seek the death penalty. Once this notice has been served, statutory protections are activated. These protections exist because the courts and legislatures recognize the uniqueness of capital punishment. They can include the appointment of specially qualified defense counsel—usually at least one attorney with a minimum number of years of criminal trial experience.

Although the actual procedure for trying a capital case varies from state to state, each trial begins with the selection of a death-qualified jury. In a capital case, all jurors must be able to consider the imposition of a death sentence. People will not be allowed to serve on a jury if their opinions for or against the death penalty would prevent or substantially impair the performance of their duties as jurors. Therefore, the fact that jurors are personally opposed to or in favor of the death penalty will not prevent them from serving provided that they are able to consider imposing the death penalty and will follow the law in doing so.

The actual death penalty trial itself is usually a bifurcated, or divided, trial. A bifurcated trial is divided into two separate phases, the guilt phase and the penalty phase. Once a jury is selected, the guilt phase begins. This portion of the trial is much like any other criminal trial. Defendants are presumed innocent, and that presumption of innocence remains unless the State proves guilt beyond a reasonable doubt. Proof beyond a reasonable doubt does not require that the prosecution remove all doubt as to the defendant's guilt. Instead, as the U.S. Supreme Court has defined it, *proof beyond a reasonable doubt* is "proof which leaves a jury firmly convinced of a defendant's guilt."

If a defendant is found guilty of a capital crime, the penalty phase begins. Once the penalty phase begins, the prosecution presents the evidence that it claims warrants the imposition of the death penalty. In a capital murder case, for example, the evidence may include "victim impact evidence," which is testimony by the victim's family about the impact of the victim's death on the family. In an attempt to show the defendant's future dangerousness, the State may present evidence of other crimes committed by the defendant and evidence of behavior while in jail. The State presents this evidence to demonstrate that death, as opposed to imprisonment, is the appropriate punishment.

During the penalty phase, a defendant may present evidence to show mitigation, which is evidence to support a sentence of less than death. Such evidence may include documentation of the defendant's good character, good behavior while in jail, and any physical or psychological problems that affect his or her behavior. In most states, capital defendants as well as their attorneys have the right to address the jury in closing.

After hearing all of the evidence in aggravation and mitigation, the jury makes a decision as to whether the defendant should be sentenced to death or to a lesser punishment, such as life imprisonment. If the State has proven at least one aggravating circumstance, the jury may sentence the defendant to death. However, the proving of an aggravating circumstance does not require the jury to impose a death sentence.

Appeals

All but one of the states that have a death penalty require that a death sentence be reviewed by a higher, or appellate, court. The court reviews the transcript of the trial, with the help of briefs and arguments presented by attorneys, to determine if there were any errors in the trial proceedings. Errors found to have violated a defendant's constitutional rights will require a new sentencing procedure or a new trial if the error occurred in the guilt phase. The death penalty may be reimposed upon retrial or resentencing.

If the state appellate court does not find that errors occurred in either the guilt or the penalty phase, the conviction and death sentence are affirmed. An execution date is then scheduled.

If defendants disagree with the findings of the state court and believe that the Constitution was violated during their trial, they may request the United States Supreme Court to review the state court's decision. Capital defendants may also request the state court to stay, or postpone, their execution date. If the Supreme Court decides to review the decision, defendants and the State will prepare briefs and present oral arguments to the Court. The Court can then either affirm the state court's decision or, if it disagrees, reverse the decision. If the Court reverses, it will normally

remand the case for a new sentencing procedure or a totally new trial.

If the Supreme Court affirms the state court's decision, the conviction and death sentence stand. Generally at this point, another execution date is scheduled. However, when the capital defendant takes the next step in the appeal process and files an application for post-conviction relief in state court, the execution date is again stayed. A post-conviction relief application is a procedure through which defendants attempt to have their convictions and sentences set aside on the ground that their attorneys were ineffective in their representation. Defendants may argue that, but for the ineffectiveness of their attorneys, they would not have been found guilty and/or sentenced to death. After a hearing during which evidence is presented, the court issues an order either affirming the conviction and sentence or granting the defendants a new trial. The party that loses in this proceeding, either the State or the defendants, may then appeal the court's order in much the same way as the initial conviction and sentence were appealed.

If the defendants lose their application for post-conviction relief in state court, a new execution date is set. They may then ask the federal court to set aside their convictions and/or death sentences. This procedure, for which the execution date will also be stayed, is known as a federal *habeas* review. Again, defendants may raise constitutional issues and challenge the ineffectiveness of their attorneys. Changes in the federal law now limit the time within which a defendant can file this type of petition.

If capital defendants are successful in their petition for relief in federal court, their sentences and, under some circumstances, their convictions are set aside and the case is remanded for a new trial and sentencing procedure. Again, upon retrial, the death penalty may be reimposed. If the petition for federal *habeas* relief is denied, the conviction and death sentence are affirmed. Defendants may appeal that ruling through the federal court system to the U.S. Supreme Court. At any stage, the reviewing court could find constitutional error and set aside the conviction and/or death sentence. If the conviction and sentence are upheld by each reviewing federal court, a new execution date is scheduled. At that time, generally only a reprieve by the state's governor will stop the execution. The governor may commute the death sentence to life imprisonment upon a determination that the action is legally appropriate. If neither the courts nor the governor intervenes, the defendant is executed.

Pros and Cons

The death sentence was a widely accepted punishment in the colonies and during the early years of the republic. Opposition, however, arose. This opposition continues through the present day.

People have opposed the death penalty for a number of reasons, including their belief that the death penalty is cruel and unusual punishment despite the holdings of the U.S. Supreme Court to the contrary. Arguments against the death penalty also include the fact that the error cannot be corrected if it is discovered that an innocent person has been executed and the assertion that the death penalty is sought and imposed on a racially discriminatory basis.

Arguments advanced in support of capital punishment include deterrence, retribution, and prevention of repetitive criminal acts by the same person. The deterrence argument is premised upon the belief that no one would commit a criminal act if he or she knew that the immediate result would be death. The deterrence argument is the one that is focused on most often and the one with which those opposed to the death penalty most disagree.

While those who oppose continue to be outnumbered by those who favor the death penalty, they have had some successes. For example, the number of crimes for which a person can be sentenced to death is much smaller today than it was in the past.

Resources

Baird, Robert M., and Stuart E. Rosenbaum, ed. *Punishment and the Death Penalty: The Current Debate.* Amherst, N.Y.: Prometheus Books, 1995.

Bedau, Hugo Adam. *Death Is Different: Studies in the Morality, Law, and Politics of Capital Punishment.* Boston: Northeastern University Press, 1987.

Draper, Thomas, ed. *Capital Punishment.* Bronx, N.Y.: H. W. Wilson Company, 1985.

Loeb, Robert H. *Crime and Capital Punishment.* New York: Franklin Watts, 1986.

U.S. Department of Justice. "Capital Punishment 1994," *Bureau of Justice Statistics Bulletin,* February 1996. ♦

ABA Calls for Moratorium on Death Penalty

In February 1997, the American Bar Association House of Delegates passed a resolution calling for a halt on executions until courts across the country can ensure that such cases are "administered fairly and impartially, in accordance with due process," and with minimum risk of executing innocent people.

The resolution cites some of the ABA's existing policies urging jurisdictions to provide competent counsel in capital punishment cases, eliminate race discrimination in capital sentencing, and prevent the execution of mentally retarded persons and persons who committed crimes as minors. The resolution also makes clear that the ABA takes no position on the death penalty *per se.*

Stop and Think!

A Learning Aid for Students
by Gayle Mertz

Sam Sheppard—Guilty or Framed?

The well-known TV series *The Fugitive* was inspired by the Sam Sheppard case. On July 4, 1954, Marilyn Sheppard, who was pregnant at the time, was brutally murdered in her Ohio home. Although her husband, Sam, was in the house, he told police that he had been asleep on a couch when he was awakened by the sounds of the murder being committed. Sheppard said that he was still groggy as he watched a shadowy figure escape. The murder attracted widespread media attention, similar to the recent O. J. Simpson and JonBenet Ramsey cases.

Based on circumstantial evidence and a lack of evidence that the intruder actually existed, Sheppard, a 30-year-old physician, was tried for murder and convicted. The conviction was overturned 10 years later in a key U.S. Supreme Court ruling that stated that prejudicial publicity had made the trial a "carnival." A second trial was held in 1966. Sheppard was defended by F. Lee Bailey, and he was acquitted. However, in the eyes of many, he was still considered guilty. Sheppard died in 1970.

Sam Reese Sheppard, the son of Marilyn and Sam, has devoted his adult life to proving that his father did not murder his mother. On February 4, 1997, the young Sheppard publicly claimed, "I feel Dad is definitely exonerated." He was able to make this statement because new DNA evidence had just been made public. DNA test results presented to the Cuyahoga County prosecutor's office (42 years after the murder) found the blood and semen of a third person on crime-scene items. Earlier this year, an Ohio judge, hearing a civil case in which Sam Reese Sheppard is seeking a declaration of innocence for his father, ordered that a blood sample be drawn from Richard Eberling, who had washed the windows at the Sheppards' home around the time of the murder. Eberling, now 67, is serving a life sentence in Ohio for another murder. He denies that he killed Marilyn Sheppard. The DNA tests found that Eberling could not be ruled out because he shared a key genetic marker with the blood and semen taken from the scene. But the DNA analysis falls short of declaring a positive match between Eberling's DNA and that extracted from evidence.

The above case raises many questions about the death penalty and about the rights of victims. Combine the information in "Seeking Justice for the Victim," page 22, and "Death Penalty in America," page 42, with the information about the Sheppard case and write three newspaper articles or editorials about the case. (You may want to do additional research.) The three articles or editorials should be dated 1954, 1966, and 1997. Each article should be based on facts and theories known or presented at the time, as well as on attitudes and policies related to the death penalty and victims' rights at the time. Questions you might address include

- Should the death penalty have been imposed in this case?
- Who were the victims in the case?
- How much time should pass before we can be certain that the right person has been accused or convicted of a serious crime?
- Compare your articles with those of your classmates.

Recommended reading on the death penalty and victims' rights: ***Dead Man Walking*** by Helen Prejean, C.S.J. New York: Random House, 1993.

Who Are the Victims?

In most murders and serious violent crimes committed in the United States, the victims and the perpetrators know one another. Domestic violence, child abuse, gang conflict, and date rape account for most violent crimes. Random acts of violence that result in death are rare. Thus, victims often have close relationships with, and allegiances to, both the perpetrator and the "actual victim." It is common for family and friends to have close ties to both parties in a date rape, killing of a spouse, abuse of a child, or violent act between members of rival gangs.

After reading "Seeking Justice for the Victim," page 22, and "Death Penalty in America," page 42, locate an article in your local newspaper about a violent crime. Make a list identifying the people whom you think are victims in the crime. Crime victims may not just be the people who are the actual victims. They are also the actual victims' family members, friends, and associates. In most courts today, each of these individuals would be considered a victim and afforded "victims' rights." You might want to review the number of people whom the press and courts identified as victims in the O.J. Simpson case.

Victims often have the right to make a public statement to the court when a criminal has been convicted and is being sentenced. Pretend that you are one of the victims in the newspaper story that you selected. Write a "victim statement" telling the court how you feel and how the crime has impacted you. Tell the court how you would like to see the convicted criminal sentenced and why. Read your statement to members of your class and compare your approaches and reactions.

Legal Careers in Criminal Justice

Richard J. Wilson

Update on Law-Related Education, 21.2, 1997, pp. 46–48. © 1997 American Bar Association.

Legal employment in the criminal justice system includes a broad range of job options in law enforcement, the courts, and the correctional systems. Jobs can be public or private, and they cover a diverse range of interests from advocate for victims to police adviser and from advocate for prison reform to prison administrator. The challenges are great. A career in criminal justice is one of the few that offers a sense of reward and personal satisfaction in working toward a more just and equitable society.

STEP ONE: Law School

For most people who seek legal careers in criminal justice, law school is the first step. There are a number of nonlawyer career choices in criminal justice—court administrator, paralegal, and police or corrections officer are some examples—but law school courses help all of them. Law school starts after college. It is normally a three-year, full-time (or four-year, part-time) postgraduate program of study leading to a *Juris Doctor*, or JD, degree. There is no prescribed pre-law program. Many students come to law school from college programs as diverse as anthropology or music, but most pre-law students study political science, economics, or English.

Getting into law school is not as hard as it was in the late 1980s and early 1990s. The number of applications has gone down since that peak time, but the process is still very competitive. To get into any law school, applicants must have good grades and strong scores on the Law School Aptitude Test, or LSAT, which is a requirement for admission to all accredited law schools. It doesn't hurt to have some relevant campus activities in college either.

STEP TWO: Bar Exam

Graduation from law school really only puts a person at the door to a legal career in criminal justice. To enter that door, one must first pass the bar examination. That test is administered by each state. The requirements and costs for admission to the bar, as well as the difficulty of the bar examination, vary from state to state. The exam is very difficult, emotionally and physically. It's usually two to three days long and includes essay and multiple-choice questions, as well as a "character and fitness" phase that examines ethical fitness to practice law. Once you have a license, you are prepared to explore relatively high-ranked careers in criminal justice in one of three broad areas: law enforcement, courts, and corrections. While some of these jobs exist at the federal level, most legal careers in criminal justice are at the state and local levels, where most crime is prosecuted.

Richard J. Wilson is professor of law and director of the International Human Rights Law Clinic at the Washington College of Law, American University, in Washington, D.C. He is a former public defender and a long-time member of the ABA Criminal Justice Section, for which he has served on several committees and the section's council.

Careers

Law Enforcement

Work as a law enforcement officer does not normally require a law degree, but some of the more prestigious federal law enforcement agencies, such as the Federal Bureau of Investigation and the Secret Service, welcome applications from lawyers who seek work as agents. Obviously, intimate knowledge of the law and the courts can be extremely useful in putting together an investigation that can withstand scrutiny by the courts. Lawyers may also advise and train police on courses of action that comply with the constantly evolving decisions of the courts and legislatures regarding crime, criminal investigation, and the protection of the constitutional rights of citizens. Complex areas requiring extensive and continuously updated information include the use of wiretaps and other electronic eavesdropping devises, the use of undercover "sting" operations, permissible arrests, searches of places and seizures of people and objects, and the identification and interrogation of criminal suspects.

Courts

Perhaps the broadest array of legal jobs is found in the criminal courts and related employment, although the courts receive a much smaller portion of the total criminal justice budget than law enforcement and corrections do. At the state level, the attorney general is usually elected, while the federal attorney general is nominated by the president and confirmed by the Senate. The staffs of both the state and federal attorneys general usually work in the capital, but regional offices also may be used. Prosecutors make the often difficult decision about whether to prosecute a crime as a capital offense or not; that is, whether the death penalty will be sought. In general, prosecutors exercise extraordinary discretion and therefore bear enormous responsibility as to whether a criminal case will proceed or be dismissed, what charges will be brought, and what evidence will be presented in court.

Another career in the courts is that of the criminal defense attorney. Public defenders are paid a salary by the federal, state, or local government to defend all of those people who cannot afford the cost of a private attorney. Public defenders do the lion's share of the defense work in the criminal courts because, at least in large urban areas, up to 85 or 90 percent of all people charged with crimes punishable with jail qualify for their services. These people are charged with crimes that, by law, require the appointment of a public defender. This right to counsel continues through the first appeal in state court, so many public defenders provide representation on appeal as well as at trial. The constitutional right to defense at government expense, however, does not extend beyond the first appeal. Defendants who challenge their convictions at a higher level, including even those under sentence of death, must either use volunteer attorneys or lawyers allowed by state law to continue to represent them.

While many of the cases handled by criminal defense attorneys, both public and private, go to trial, the majority are dealt with through the unique American institution known as "plea bargaining." Through plea bargaining, prosecution and defense lawyers agree not to go to trial as long as the defendant agrees to plead guilty to one or more of the charges, sometimes for a predetermined sentence. Thus, both prosecutors and defense attorneys not only must be good at the skill of oral advocacy at trial, but must also be excellent negotiators for their clients. Public defenders and private criminal defense lawyers are usually seen as advocates with a strong moral commitment to the rights of the criminal accused and with a tenacious will in defending the accused, even in the face of almost universal public condemnation.

Each state or locality, as well as the federal criminal justice system, offers different options for the organization of prosecutorial and defense services. While the prosecutors are usually organized at both the state and county levels, public defense in most states is some mixture of full-time and part-time staff in the large cities. Smaller towns often use private attorneys who contract for a specific portion of the cases or private attorneys who volunteer to list themselves as attorneys ready to accept appointment in individual cases. When attorneys put their names on the list, the judge usually appoints the attorneys on a rotational basis. An appointed attorney submits a bill for services and expenses at the close of a case. Salaries for public defenders are low, compared to those of most attorneys, including some prosecutors. Many lawyers, however, choose to do public defense work because they like the idea of protecting the right of citizens, regardless of wealth, to a fair and impartial trial or maybe just because they love to fight for the underdog.

Judges in criminal courts do not usually start their careers as members of the judiciary. Many judges have

had long legal careers, and quite a few are former prosecutors or defense attorneys. There is no formal system of preparation for becoming a judge, so both state and federal judges have national schools, which provide them with on-the-job training for their work. Judges sit at all levels of the criminal justice system, hearing both trials and appeals. Usually, one judge hears a criminal trial, while appellate review is before a panel of three or more judges. The nine people who sit on the United States Supreme Court, the highest court in the United States, are called *justices*. They usually set national precedents in several important criminal law and procedure decisions each term, or court year, from October to June. Their appointment to that court normally follows a long and distinguished career as a lawyer, a judge, or a recognized legal scholar.

Federal judges are appointed by the president for life terms, with removal only by impeachment proceedings in the U.S. Congress. Lifelong appointments help guarantee the independence and impartiality of the federal judiciary, which has primary responsibility for interpretation of the Constitution. State judges, on the other hand, are appointed through the executive branch or a nominating commission, or they are elected. They typically serve for a fixed term of from four to 12 years, and in some cases they retain their positions on the bench unless they are voted out of office. Despite occasional sensational news accounts, judges and prosecutors in the criminal courts of the United States are remarkably safe in their jobs and run very little risk of retaliation from disgruntled defendants or victims.

There are a few other career opportunities in positions attached to the work of the criminal courts. Victims' rights advocates sometimes appear to argue for greater attention to the needs of specific victims of crime or for victims' rights in general. Other advocates may play special roles in the protection of the rights of children, the mentally disabled, or other special groups who confront the criminal justice system. Some people make legal careers from particular aspects of the criminal process, such as pre-trial services--bail and other release decisions—or as probation and parole officers, who deal with issues concerning the defendant's release from jail. Finally, the courts require extensive administrative support. The chief administrative officer of a court is often a lawyer appointed to that job by the court or by the executive branch. The courts may require the technical skills of a lawyer for their smooth and efficient operation.

Corrections

Just as the police must have good legal advice to perform their jobs, corrections officials need adequate legal counseling. Prisons and jails all retain the services of attorneys to deal with administrative and court challenges to their operation. Some states require that the chief administrative officer of a prison facility, the warden, and the director of corrections be lawyers. Inmates file actions challenging conditions of confinement and other violations of their civil rights while incarcerated, and either the prison itself, or the state, must defend these actions in court. Few lawyers make their careers defending the rights of prisoners, but lawyers have often successfully challenged either oppressive prison conditions or abusive treatment by jail personnel in court. Another major issue now is the privatization of corrections facilities. Through privatization, the state removes itself from the administration of prisons, leaving the work to be performed by private companies. Many lawyers have developed significant expertise on both sides of the legal issues involved in privatization of prisons.

Other Opportunities

A discrete but growing area of criminal justice work is in the area of international criminal law. As the "global village" grows, the need for international cooperation in the apprehension and prosecution of criminals becomes more urgent, particularly in the areas of terrorism and drug trafficking, and there is a developing need for lawyers with knowledge of international criminal practices. These include the legal questions raised with regard to extradition (movement of people charged with or convicted of crimes from one country to another), the use of international legal-assistance agreements to obtain evidence from abroad, the transfer of prisoners, and other complex issues involved in the administration of international treaties and customary international law, as well as developing norms of international human rights law.

In short, criminal justice provides a wide array of legal career opportunities for persons seeking a way to make a difference in the local or even the worldwide struggle toward a safer, more secure, and more just world.

Student Forum

Fair Trials and Free Press

Gayle Mertz

Update on Law-Related Education, 21.2, 1997, pp. 49–52. © 1996 American Bar Association.

To the Teacher

This forum is a student-organized role-play that will extend student thought on the potential conflict between freedom of the press and the rights of defendants and victims. Students will be asked to incorporate information provided in the articles with independent research to form opinions about the controversial conflict of maintaining a free press while providing fair trials to people accused of committing a crime and protecting the rights of victims.

Students are responsible for the forum. Your role is to provide copies of materials and serve as a consultant. Roles have been developed to bring out diverse perspectives and illustrate the complexity of the issues. You might select readings and use teaching strategies that will give students the background needed to participate in the forum. Recent articles about the Oklahoma bombing trials would serve this purpose well.

The forum should take from two to five class periods, depending on the number of roles and the amount of discussion, and whether or not the class chooses to invite guest speakers. Independent research will elevate the quality of student presentations and overall scholarship. You or your students may elect to use all the sample roles provided, or you may revise or replace them. Make sure that the roles represent diverse philosophical viewpoints.

To the Student

This forum will give you an opportunity to take responsibility for your own learning. It is similar to a panel discussion in which people come together to debate issues. The activity will help you explore other people's views on a controversial and legally complex issue and examine your own as well.

During this forum, you will consider how to balance the rights of victims and defendants and the freedom of the press. Balancing fair trials, the rights of defendants and of victims, and freedom of the press is a particularly difficult issue. Almost everyone in this nation believes that we should have a free press, that the accused should have a fair trial, and that victims of crime should have their rights protected. Yet, these rights often come into conflict with one another. Some questions you might consider during the discussion are

- What are the rights of defendants?
- What rights should victims have?
- Does the public's right to know outweigh the rights of defendants and victims?
- Can press coverage of a crime interfere with police investigations and cause pretrial prejudices?

How to Conduct the Forum

1. The class selects six students to serve on the panel.
2. All students complete the preforum ballot and submit it to the panel.
3. Students form groups to develop or adapt forum character roles.
4. Students identify community members to invite to participate in the forum. Community members may represent themselves, serve as coaches for the panelists, or play one of the roles.
5. The panel selects a facilitator and clerk from among student volunteers. The facilitator coordinates speakers and maintains order if necessary. The clerk records key ideas expressed.
6. The panel conducts the forum.
7. All students complete a postforum ballot. The panel reviews, compares, summarizes, and reports the results to the class.
8. Students compare and discuss how the forum presentation might have changed their opinions.

Getting Ready

To prepare for this forum, review literature, including readings from this issue of *Update*, and other materials about defendant's and victim's rights and free press issues. Contact professionals who can help you prepare for the forum or who might participate in it. Professionals include news reporters and editors, police officers, lawyers, judges, and victims' rights advocates.

Background

You live in a small town. Most of the town's residents have lived here for a long time, and everyone seems to know each other. You have very little crime in your community, but when something does happen, there is usually a lot of gossip about the situation. Recently, just before classes started at the local high school, several students found the body of a well-respected teacher on the floor of her classroom. She had been violently murdered. When one of the students screamed, several other students entered the crime scene.

Everyone in town is upset about the crime. They are concerned about their personal safety, and they are also curious about what happened. The local police chief is handling the investigation and refuses to release any information about the crime. No suspects have been identified yet. The local newspaper and the national media have insisted that the police chief immediately release details about the ongoing investigation.

Introduction

Roles The following people have agreed to meet to discuss their views and positions in a panel discussion. They represent the interests of the legal system, the media, and the family of the victim. Students playing the roles should have five minutes to present their positions and to answer questions from the audience. Students in the audience may play the role of reporters covering the discussion and residents of the community. When questioned by the audience, the students should answer in a manner consistent with their roles.

Role 1: Mildred McDonald Most of you know that I am Mildred McDonald, the chief of police. I have worked for the police department for nearly 20 years and have served as the police chief for the last eight years. I am proud of our fine police department and its professionalism. The murder of the schoolteacher has shocked the entire community. All of my officers knew the victim; in fact, most of them had her as a teacher. The officers and I are working very hard to put aside our personal emotions and to handle the murder investigation by the book.

Because the crime of murder is rare in our community—the last one was seven years ago—we have not had much experience in murder investigations. But our officers are well trained, and we are working with the regional crime lab and have the assistance of regional investigators. We know that releasing detailed information about an investigation can destroy a case and make a successful arrest and prosecution difficult. There is evidence from the crime scene that only the murderer would be familiar with. If we release this information now, it will be more difficult, if not impossible, to identify and arrest a suspect. I know that people are worried and fear for their safety. I can assure you that the department is working to ensure your safety and to solve this crime quickly. I also know that a lot of people are just busybodies. I have received over a hundred calls from people who want me to tell them what we found at the murder scene. For the sake of the investigation, I am not releasing any information at this time.

Role 2: Juan Perez I am Juan Perez, the editor of *The Dispatch*, your local newspaper. I have always worked closely with the police department, and we have a good relationship. When they want to get information out to the public, I always cooperate by including the information in the paper. The murder of the teacher is the biggest story in this town for years, and suddenly I can't get any information from the police department. I have received dozens of calls from people who have heard rumors about the case. I must say that some of the rumors are wild. One citizen thinks that the murder was committed by an extraterrestrial, and another thinks that the teacher was a double agent.

It is my responsibility to publish reliable facts and to inform the public. I believe that the police department has a duty to provide reliable information to my newspaper and the other media. The public has a right to the information, and we must inform the citizens so that they can take necessary precautions to protect their families if there is a murderer in our midst. I have hired a lawyer to go to court and force the police department to release information. One of our most basic constitutional rights is freedom of the press. That freedom includes the right to accurate, reliable information about news events.

Role 3: Judd Thompson I'm Judd Thompson, and my sister is the murder victim. Our family is in a state of shock; we are victims, too. Our lives will never be the same. We have lost our loving and kind daughter, sister, mother, and wife. Since the murder, some people in this town have spread rumors about our family members. They say that one of us killed my sister because she had a large life insurance policy. Other people have been very kind and very supportive. Right

now, though, our family just wants to be left alone. We want our privacy to be respected and to mourn our loss in peace.

We do not want the press hounding us and asking questions. We do not want the press writing about our daily activities. We do not want everyone in town reading ghastly details about how my sister was murdered and what the crime scene looked like. Some people have actually said that they think a picture of my sister's bloody body should be published in the local paper. My brother Aaron is an attorney, and he has advised everyone in the family to refuse to talk to the press or the police. We have a right to our privacy, and we have a right not to be interrogated. We are not suspects, but if people hear that we are being questioned by the police, they may think that we are suspects. We don't know anything about the murder and don't want the police or the press disturbing us.

Role 4: Henry Spiegel My name is Henry Spiegel, and I am an attorney specializing in First Amendment issues. I have been hired by Mr. Perez's newspaper and several big city newspapers. This story is big news in our state, and the people have the right to know what information is contained in public documents such as search warrants, evidence reports, etc. When government documents are kept secret, the foundation of our democracy is at risk. Police officers, coroners, and prosecutors are all public officials and are answerable to the public. They may not withhold information from the public or conduct the public's business in secret.

We recognize that some of the information gathered in this investigation may be delicate and may offend some people. Nevertheless, the press has an absolute right to print information even if it is offensive or upsetting. The freedom of the press to print information is guaranteed by the Bill of Rights' First Amendment, which says that no law can be made to limit the freedom of the press. This means that the press has the right *and* the responsibility to inform the public.

Role 5: Randy Rock I am Randy Rock, the producer of a tabloid television program. This story is sensational. It is just the type of story that viewers of our program want to know more about. On our program, we have uncovered scandalous and secret information about murder victims and their killers. This case is no exception. Our sources have provided us with information that leads us to believe that the victim was not simply a schoolteacher in a small town. There is more to this story.

We believe that the FBI is secretly involved in this case, and we want their complete files. We want to know where the victim went when she traveled in the summer, who her friends were, how much money she had, and what organizations she belonged to. We have a right to access secret FBI files under the Freedom of Information Act and to inform the public about what is really happening. The people want to know!

Role 6: Julia Chen I am Julia Chen, a judge in the county court system. I have just issued an order to seal all files related to this murder case for the next 30 days. The files include technical information that will help lead the police to a suspect or suspects and will assist the prosecutor. To ensure that prospective jurors and witnesses are not prejudiced by media reports and speculation, it is necessary to keep these reports confidential. It is only in extreme circumstances that I exercise my authority to seal files. In this case, I believe the extensive press coverage and gossip may jeopardize our ability to bring a defendant to trial and to seek justice for the victim.

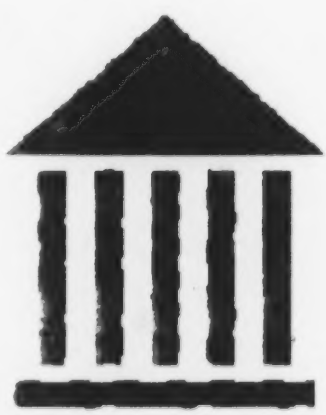
Answers to the Law Term Puzzle on Page 27

Across

2. juvenile justice
4. community policing
7. misdemeanor
8. accused
10. Fifth Amendment
12. parole
13. sequester
14. intent
15. witness
16. appeal

Down

1. Fourth Amendment
2. jury
3. victim
5. *Miranda* warnings
6. cruel and unusual
9. speedy trial
11. felony



122

Forum Ballot

Can the Conflict Between the Right to a Fair and Impartial Trial, the Rights of Victims, and the Rights of a Free Press Be Resolved?

Circle the choice that best answers how you feel about the rights of a free press when they are in conflict with the right to a fair trial.	**strongly agree**				**strongly disagree**
1. The press should not be allowed to publish the names of suspects unless they are charged with a crime.	1	2	3	4	5
2. Out of respect for the dead, the press should not be allowed to publish photographs of the bodies of murder victims.	1	2	3	4	5
3. The media should be allowed to enter a crime scene and take pictures to report to the public.	1	2	3	4	5
4. The media should be provided with the names of all suspects in serious crimes.	1	2	3	4	5
5. The media should be given access to evidence so that they may have their own experts analyze the evidence to see if they reach the same conclusions as the police.	1	2	3	4	5
6. The press should always be allowed in courtrooms when court is in session.	1	2	3	4	5
7. The media should not be allowed to publish the names of juvenile defendants.	1	2	3	4	5
8. The press should not be restricted from publishing the names of rape or child abuse victims.	1	2	3	4	5
9. The press should be allowed to publish the names of jurors serving on a particular case.	1	2	3	4	5
10. If a witness is afraid to testify in front of the press, the press should be removed from the courtroom.	1	2	3	4	5
11. The press should be required to give law enforcement officials any information related to a crime that they uncover.	1	2	3	4	5
12. The media should be allowed to interview jurors during the course of a trial.	1	2	3	4	5
13. The police should not have to reveal information about a crime during an investigation.	1	2	3	4	5
14. The police and the media should cooperate with one another during a crime investigation.	1	2	3	4	5
15. The right of the public to have information outweighs the rights of defendants and victims.	1	2	3	4	5
16. Victims and their families should have the right to accept or reject press interviews of their cases.	1	2	3	4	5

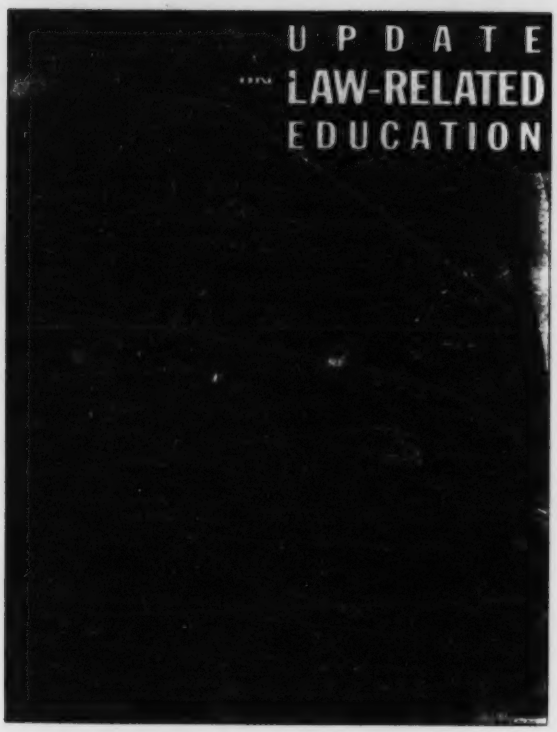
Write a short answer. Which do you think is most important: freedom of the press, rights of the defendant, or rights of the victims? Explain.

123

Law-Related Education Essentials Matrix

From *Essentials of Law-Related Education.* © 1995 American Bar Association.

	TS p. 9	TS p. 29	TS p. 39	SF p. 49
Subject Matter				
Power				
What key concepts and attributes are of U.S. constitutionalism				
. . . enumerated rights (Bill of Rights)	x	x	x	
Justice				
Role of courts and other institutions/professionals of the justice system in American government and society	x	x	x	x
Definition of certain attributes and values of the U.S. justice system				
. . . judicial review			x	
. . . due process of law	x		x	
. . . privilege against self-incrimination		x	x	
. . . prohibition against cruel and unusual punishment		x		
. . . constitutional limitations on search and seizure		x		
Liberty				
Fundamental constitutional rights				
. . . freedom of the press				x
. . . right to privacy				x
Essential Documents				
U.S. Constitution and Bill of Rights	x	x	x	x
Contexts and Practices of Instruction				
Conditions Necessary for Effective LRE Instruction				
Access to, and use of, community resource leaders		x		x
Access to, and use of, exemplary classroom materials	x	x	x	x
Problem-oriented approach to instruction	x	x	x	x
Developmentally appropriate instruction	x	x	x	x
Instructional Strategies				
Instruct interactively				
. . . use cooperative learning strategies, simulations, and role plays	x	x	x	x
. . . use group work activities, including group research projects	x	x	x	x
Develop curriculum				
. . . balanced	x	x	x	x
. . . relevant	x	x	x	x
. . . deliberate in consideration of controversial issues			x	x
Assessment				
Assesses students' values, interests, experiences, and knowledge prior to, and after, instruction				x
Bases assessment on performance and outcomes	x	x	x	
Skills				
Thinking				
Developing capacity for understanding when and how laws apply to specific fact situations			x	
Making informed decisions and judgments about situations involving the law and legal issues	x	x		x
Communications and Social Participation				
Articulating and expressing ideas, beliefs, and opinions regarding legal issues	x	x	x	
Working cooperatively with others to make decisions and take actions concerning hypothetical or actual legal and law-related social issues	x			x
Attitudes, Beliefs, and Values				
Substantive				
Furthering dedication to the ideal of justice in society	x	x	x	x
Procedural				
Understanding how attitudes, values, and beliefs essential to LRE are fostered through teaching of fundamental subject matter	x	x	x	x



COMING THIS FALL

Civil Justice
Articles, lessons, and educational resources focusing on timely civil justice issues

DIVISION FOR PUBLIC EDUCATION

AMERICAN BAR ASSOCIATION
YEFC/15.3
541 North Fairbanks Court
Chicago, IL 60611-3314
http://www.abanet.org/publiced
(312) 988-5735
Internet: abapubed@abanet.org

ADDRESS CORRECTION REQUESTED

Non-Profit Organization
U.S. Postage
PAID
American Bar Association

Fall 1997 / VOL 21 NO 3

$10.00

UPDATE ON LAW-RELATED EDUCATION

American Bar Association Standing Committee on Public Education

CIVIL LAW

Parameters, procedures, and protections

Featuring These Educational Tools for Civics, Government, and History Classrooms:

- Feature Articles About Civil Law
- NEW! Student Lawyer Exchange
- Classroom Strategies
- NEW! Super-Size Poster with Lesson and Student Handout
- NEW! Expanded 3-Page Resource Section
- Update on the Courts
- NEW! Update on Congress
- NEW! Civil Law Glossary

What's Inside?

When I learned that the fall 1997 edition of *Update on Law-Related Education* was being devoted to the U.S. civil law, I knew that there was a great need for increased public awareness about it.

Nothing drove this home with more strength than the revelation from one of our contributors that she didn't know there was anything but criminal law until she went to law school. That doesn't seem unusual for a recent college grad still wet behind the ears, does it? The fact is, this contributor had entered law school after she and her husband had raised their family—they had purchased real estate, bought health and life insurance, maintained a household, purchased household goods, shepherded children through the school system, and engaged in thousands of everyday activities that civil law protects without knowing it was there to protect them and scarcely equipped to invoke those protections had they needed them. On behalf of the *Update* staff, I thank her and our many other writers for their contributions to this edition, which will now furnish teachers with important new tools for preparing young people to handle the exigencies of adulthood.

Very special thanks go to Jerome J. Shestack, president of the American Bar Association, for taking time out of his busy schedule to prepare the Foreword to this edition, as well as to Dianne K. Dailey, chair of the ABA Tort and Insurance Practice Section, and its staff director, Susan Lynch, for identifying the ABA member-lawyers who contributed their expertise in crafting our civil-law articles and numerous instructional materials.

If you have already thumbed through your fall 1997 issue of *Update on Law-Related Education*, you'll see that it introduces a revised format to subscribers. Not only are there several brand-new and enhanced features, but the method of furnishing them to you has been changed for your convenience.

In this issue, you will find a new, super-size teaching poster, as well as a lesson with reproducible student handouts for it within the magazine. This poster replaces the smaller one previously sent with the *LRE Report*. The lesson and student handouts will make the poster more useful in the classroom.

We've added the section "Update on Congress" too, supported by its own activities, as well as the "Student-Lawyer Exchange," which will help classrooms connect with their local legal communities.

In addition, the new "LRE Project Exchange" introduces teachers to law-related programs around the country. And there's still more—*Update* now supports teachers by including an expanded glossary with vocabulary exercise and a comprehensive multimedia resources section.

All this comes with our feature articles written by legal experts, excellent teaching strategies, and other instructional support prepared by LRE specialists. And, for your convenience and ease of use, the entire *Update* program will come to you in three mailings that contain all the materials you previously received each school year, plus the new items described above.

The *Update* staff thanks you for your interest in this important publication and for your continued support of law-related education in the classroom. Your feedback is very important to us, so I encourage you to complete and return the enclosed card to let us know how you like the new program.

Seva Johnson

Seva Johnson
Editorial Director
Youth Education Publications

Cover Illustration by David Lee Csicsko **Design by DePinto Graphic Design**
Produced by Creative Services Associates, Inc.
©1997 American Bar Association
ISSN 0147-8648 PC#738-0100-2103
Funding for this issue has been provided by the American Bar Association Fund for Justice and Education; we are grateful for its support.

Update on Law-Related Education **is published three times each year (winter, spring, fall) by the American Bar Association Standing Committee on Public Education. Chair: Allan J. Tanenbaum; Director, Division for Public Education: Mabel C. McKinney-Browning; Director, Youth Education Programs: Ronald A. Banaszak; Director, Publishing and Marketing: Seva Johnson; Editor: Kenneth F. Feniske.**

Update **helps secondary teachers of civics, government, history, and law, as well as law-related education program developers, to educate students about the law and legal issues. The views expressed in this document are those of the authors and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association, the Fund for Justice and Education, or the Standing Committee on Public Education.**

A one-year subscription to *Update on Law-Related Education* costs $30.00 and includes three issues of the magazine with poster. For subscription and back-issue information, contact American Bar Association/Division for Public Education, 541 N. Fairbanks Court, Mail Station 15.3, Chicago, IL 60611-3314; (312) 988-5735. http://www.abanet.org/publiced FAX (312) 988-5494, ATTN.: Circulation Manager. E-mail: abapubed@abanet.org

FOR CUSTOMER SERVICE, CALL (312) 988-5522.

All rights reserved. Printed in the United States of America.
The American Bar Association is a not-for-profit corporation.

Printed on recycled paper

EdPress

—SCHEDULED FOR PUBLICATION THIS WINTER—

DON'T MISS OUR SPECIAL EDITION ON

The Bill of Rights

Contents

Volume 21, Number 3
Fall 1997

Civil Law:
Parameters, procedures, and protections

4 Foreword ***Jerome J. Shestack***

6 **Understanding the Civil Justice System** ***Robert E. Hirshon and Linda M. Bolduan*** *answer an important question: What exactly is civil law?*

10 **Civil Procedure** ***Robert Byer*** *explains the requirements of civil procedure.*

12 **Perspective:** Double Jeopardy—Another Look ***Dianne K. Dailey and Linda M. Bolduan*** *inquire whether civil law and the Fifth Amendment are in conflict.*

13 **Tort Law and the Civil Jury** ***Keith A. Pittman*** *defines torts, traces the roots of tort law and the civil jury, and discusses the main areas of tort law.*

17 **Perspective:** Academic Controversies as a Vital Instructional Tool ***David W. Johnson and Roger T. Johnson*** *explain how the process of academic controversy can educate students about civil justice and other law-related subjects.*

Debate: Is American Society Too Litigious?

18 **Yes** ***Waldemar J. Pflepsen Jr.*** *says the 18–30 million civil cases in the courts each year prove there is too much litigious activity in the United States.*

19 **No** ***Marianna Smith*** *says divorce, small claims, and property rights—all legitimate concerns of citizens—account for the bulk of the civil cases.*

24 **Update on the Courts**
A review of the Supreme Court's 1996 term is followed by two summaries of important Supreme Court decisions.

31 **Update on Congress**
This section discusses legislation recently passed or being considered by Congress.

33 **LRE Project Exchange** ***Paula A. Nessel*** *reports on Project P.A.T.C.H.'s approach to teaching law and citizenship in K–12 classrooms.*

35 **Student-Lawyer Exchange** ***Dianne K. Dailey and Linda M. Bolduan*** *offer hypothetical situations students can use as conversation starters with lawyers, judges, and other legal resource people.*

36 **Teaching Strategy**—Teaching About Tort Law ***Stephen A. Rose*** *helps students explore tort law by studying different types of torts and learning the standards used to establish negligence and liability.*

41 **Teaching Strategy**—Teaching Civil Justice Through Academic Controversy ***David W. Johnson and Roger T. Johnson*** *show students how to use the academic controversy process to evaluate the pros and cons of both sides of an issue.*

44 **Teaching Strategy**—Tort Law and the Civil Jury ***Keith A. Pittman*** *helps students examine problems that the tort system seeks to address and research issues underlying the tort system.*

47 **Student Forum**—Is Our Nation Too Litigious? ***Rita G. Koman*** *offers students the opportunity to consider how the growth of litigation has impacted the national economy and societal resources.*

52 **Teaching Strategy**—Using the Civil Law Poster *Activities and handouts are offered that can be used with the Civil Law poster.*

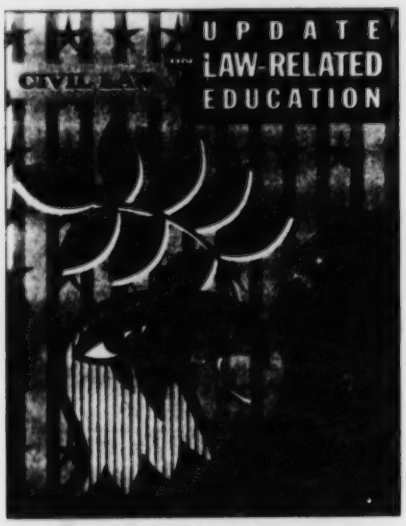
55 **Teaching Strategy**—Learning About Congress *Students are encouraged to expand their knowledge of Congress, its members, its activities, and the issues it faces.*

56 **Civil Law Terms You Need to Know**

57 **Resources for Teaching**—Multimedia Resources on Civil Law

60 **Civil Law Glossary**

63 **Law-Related Education Essentials Matrix**



Update on Law-Related Education
Editorial Advisory Board

Lee Arbetman
Street Law, Inc.
Washington, D.C.

Marshall Croddy
Constitutional Rights Foundation
Los Angeles, California

Frank Kopecky
University of Illinois
Center for Legal Studies
Springfield, Illinois

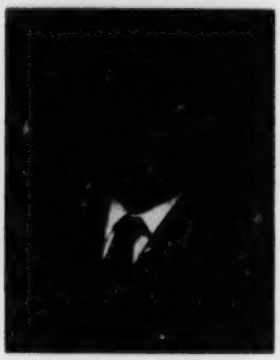
Gayle Mertz
Law-Related Education Network
Boulder, Colorado

Michael H. Reggio
Oklahoma Bar Association
Oklahoma City, Oklahoma

David Schimmel
Department of Educational Policy, Research, and Administration
University of Massachusetts
Amherst, Massachusetts

Beverly Barr Vaughan
Rochester, New York

Foreword



Public opinion polls, surveys conducted by academics, news organizations, and focus-group researchers, regularly reveal that a vast majority of Americans base their impressions about our justice system on events in the criminal courts. Most often, these are sensational cases that capture the public's attention. Such findings are not terribly surprising; after all, high-profile criminal trials are customary fodder for novels, headlines, the tabloid press, and Hollywood blockbusters.

The irony of this situation is that, although the public's perceptions of the justice system are informed largely by criminal matters, it is far more likely that any direct individual involvement Americans will have with the justice system will be in a civil matter. It is the civil justice system that plays a pivotal role in guiding our daily interactions—our relationships with our families, our business and personal transactions, and our interactions with neighbors.

The purpose of this special Civil Justice Edition of *Update on Law-Related Education* magazine is to make the civil justice system more accessible and more understandable to educators, students, and the general public. The articles, teaching strategies, and other materials help to achieve this goal by addressing the various workings of the civil justice system in a straightforward and dispassionate manner. Included in the discussion are an examination of the parameters of civil law, including procedures used in civil courts, a special focus on the important area of tort law, civil cases recently decided in the Supreme Court, and congressional activity that might influence civil law.

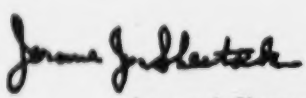
Of special interest to the educator is the thoughtful debate titled "Is American Society Too Litigious?" It captures the substantive essence of a national dialogue that has often been the subject of demagoguery and hard-core partisan politics over the past several years. The balanced approach taken allows students to compare the arguments of both sides without resorting to the belligerence that traditionally accompanies such a discussion. The student forum enables the class to examine the situation even further and to form individual opinions based on informed dialogue from opposing viewpoints.

This publication thus paints an accurate and important picture for the educational community—civil law not only plays a part

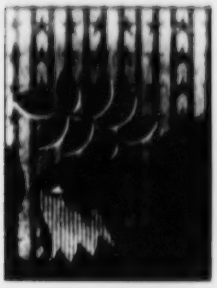
in the life of every citizen, but it also has a particularly pronounced role in the orderly functioning of a civil society. For example, it is the civil law that protects the rights of businesses to operate freely, protects fair competition in a free market society, and protects the rights and liberties of citizens. It is also the civil law that protects consumers, settles family disputes, and provides the forum to resolve the myriad of other disputes that arise in our society.

This publication should be a valuable resource for student and teacher alike as it helps them discern the inner workings of the civil justice system. This is no small matter because an American public that better understands the system is one whose citizens are able to use it more effectively and efficiently. Moreover, if citizens are more aware of the critical role of the justice system, they will have a greater confidence in it as well as be more supportive of public funding for the courts; more energized to support independent, nonpartisan judges; and better able to resolve their disputes without the anxiety and frustration that often manifests itself in harmful ways.

I hope you find this work useful in any educational program designed to improve the public's knowledge about the system of justice.



Jerome J. Shestack
President of the American Bar Association



Understanding the Civil Justice System

What exactly is civil law?

Robert E. Hirshon and Linda M. Bolduan

Update on Law-Related Education, 21.3, 1997, pp. 6–9. © 1997 American Bar Association.

What Exactly Is Civil Law?

Civil law seeks to resolve disputes that involve widely diverse noncriminal matters, such as disagreements over the meaning of contracts, property ownership, divorce and child custody settlements, payment for personal injury, and insurance claims. Civil law can be developed by judges (this is called *common law*), or it can be contained in statutes passed by the federal or state governments.

While usually not as high profile as criminal law cases—for example, the recent World Trade Center and Oklahoma City bombing trials or O.J. Simpson's trial for murder—some civil law cases receive an enormous amount of media attention, such as the recent Baby Richard adoption case and the tobacco industry liability cases. Other familiar areas of civil law include environmental, inheritance, patent and copyright, bankruptcy, aviation, and business law.

Tort law is another very important area of civil law that many people cannot name, even though they basically understand this type of law. *Torts* are legal "wrongs." If a person has intentionally inflicted emotional distress on a neighbor or negligently destroyed a local fishing industry by causing a massive oil spill, that person has committed a tort. (See page 13 for more about tort law.)

See Teaching Strategy for this article on page 36 and Student-Lawyer Exchange on page 35.

Is a Case Civil or Criminal?

Some types of cases, such as assault, murder, or child support, may be separately pursued in both civil and criminal actions. In contrast to criminal cases in which only the government can bring charges and prosecute the alleged offender, civil cases, depend-

Robert E. Hirshon is a shareholder in the law firm of Drummond Woodsum & MacMahon in Portland, Maine. He heads the law firm's Financial Services Group, which provides litigation and regulatory legal services to banks and insurance companies. Hirshon has served as chair of the American Bar Association's Tort and Insurance Practice Section.

Linda M. Bolduan is an associate with Bullivant, Houser, Bailey, Pendergrass, and Hoffman in Portland, Oregon. Her practice focuses on insurance coverage, and she is the co-author of a number of articles involving property insurance issues.

These Types of Laws Are Civil Laws

Administrative Law
Agricultural Law
Animal Law
Art Law
Aviation & Aerospace Law
Bankruptcy
Business Law
Computer Law
Construction Law
Consumer Law
Employment Law
Entertainment Law
Environmental Law
Health Law
Indian Law
Insurance Law
Intellectual Property Law
International Law
Land Use Law
Military Law
Municipal Law
Personal Injury Law
Professional Malpractice
Securities Law
Sports Law
Tax Law
Toxic Tort Law

ing on what is at issue, can be brought by the government and/or an individual. The government and/or an individual can sue an alleged offender.

Suppose, for example, that someone robbed a store, thus breaking the law against robbery. As with all criminal cases, the government prosecutes the alleged robber, who, if found guilty, may be sentenced to jail.

Suppose, however, that an automobile and a bus collided as the drivers tried to avoid hitting the alleged robber, who rushed into the street while trying to escape. The vehicles are totaled, passengers are injured, and the robber is sued for damages by all injured parties, including the insurers. You might wonder why both the government and the injured parties can take the hapless robber to court.

Federal and State Court Systems

Both the federal and state court systems have trial courts, appeals courts, and courts of last resort. A court of last resort is the final court that can make a decision in a case. Courts of last resort are generally called "supreme courts."

In the federal court system, the trial courts are called "district courts." Every state has at least one federal district court.

The federal appeals court are called "circuit courts." There are thirteen circuit courts—including the First Circuit Court of Appeals to the Eleventh Circuit Court of Appeals, the Circuit Court of Appeals for the District of Columbia, and the Federal Circuit Court of Appeals.

Each of the numbered circuit courts hears appeals from certain states. For example, the Fifth Circuit Court of Appeals hears cases from Texas, Louisiana, and Mississippi, whereas the Tenth Circuit Court of Appeals hears cases from Wyoming, Utah, Colorado, New Mexico, Kansas, and Oklahoma. The District of Columbia Circuit Court hears cases from Washington, D.C. However, the Federal Circuit Court, which is also based in Washington, D.C., hears only certain types of cases, such as all patent appeals.

The federal court of last resort is the United States Supreme Court. It is located in Washington, D.C.

In addition to the general trial, appeals, and supreme courts, there are courts that handle specific types of actions. For example, within the federal court system there are separate courts for bankruptcy, tax, and international matters. States may have courts that handle only small claims or probate (inheritance and wills). Both the federal and state systems also have various administrative courts, such as those that are part of industrial or human rights commissions.

In a typical civil case, an individual—the plaintiff—sues another person—the defendant—to enforce private rights or to seek relief for some injury.

The Civil Case

In a typical civil case, an individual—the *plaintiff*—sues another person—the *defendant*—to enforce private rights or to seek relief for some injury. Defendants sometimes countersue. Unlike criminal cases, civil cases are not about whether a defendant is guilty or not guilty, and no one is sentenced to jail. Generally, civil actions do not seek to punish, and defendants in a civil action are never in jeopardy of losing their freedom. Instead, civil suits try to determine whether the defendant is *liable*—responsible and accountable—for the plaintiff's injuries.

Common Law

Common law is a body of rulings made by judges on the basis of community customs and previous court decisions. It forms an essential part of the legal system of many English-speaking countries, including the United States and Canada. Common law covers such matters as contracts, ownership of property, and the payment of claims for personal injury.

Early in England's history, judges decided cases according to the way they interpreted the beliefs and unwritten laws of the community. If another judge had ruled in an earlier, similar case, that judge's decision was often used as a *precedent* (guide). After many judges decided the same question in a similar way, the ruling became law.

Common law is often contrasted with *civil law*, a body of rules passed by a legislature. Under civil law, a judge decides a case by following written rules, rather than previous court decisions. Common law also differs from *equity*, a set of standards developed to allow greater flexibility in court decisions. During the late Middle Ages, England created courts of equity to decide cases that courts of common law might treat too strictly. These courts decided cases by broad principles of justice and fairness, rather than by the rigid standards of common law. The monarch's chancellor presided over a court of equity called the *court of chancery*.

The legal system of the United States has developed from English common law and equity. Only one U.S. state, Louisiana, modeled its legal system on civil law. Louisiana used the civil law of France, called the *Code Napoléon*. During the late 1800s, many states combined their courts of common law and courts of equity. One group of judges administers the combined courts. In Canada, similarly, only the province of Quebec based its legal system on French law.

From THE WORLD BOOK ENCYCLOPEDIA.

© 1997 WORLD BOOK, INC. By permission of the publisher.

If, for example, a jury (or a judge) determines that a defendant is liable for the plaintiff's injuries, the jury will then determine what sort of relief the plaintiff should get for his or her injuries. The relief awarded to the plaintiff is called a *remedy*.

Perhaps the most common remedy is monetary compensation. In legal terms, monetary compensation is known as damages.

Perhaps the most common remedy is monetary compensation. In legal terms, monetary compensation is known as *damages*. If a jury awards damages to the plaintiff, the court generally orders the liable defendant to pay to the plaintiff the amount of damages specified by the jury. Sometimes, however, the court may reduce the amount of damages awarded by the jury.

Another remedy is injunctive relief, which means that the court orders the defendant to perform or not to perform specified acts. For example, the court may order a defendant to start paying additional child support or to stop manufacturing and selling a product to which someone else holds a patent. Thus, the ultimate goal of civil law is to ensure that disagreements are fairly and finally settled.

Procedure, Delays, Alternatives

A civil lawsuit typically begins when a person determines that resolution of a problem is unlikely without the intervention of the courts and has a lawyer file a lawsuit. Legal action may appear to be the only way, for example, to enforce a contract to complete repairs on a leaky roof or to determine whether the driver who injured someone when he ran a red light is liable for that person's lost time at work.

A civil lawsuit typically begins when a person determines that resolution of a problem is unlikely without the intervention of the courts and has a lawyer file a lawsuit.

A set of rules determines how a civil case will proceed from the time a suit is filed through the final judgment. There are similar rules of civil procedure for both federal and state trials. (See page 52 and the poster, including related activities on pages 53–54, for more information and instructional tools about civil procedure.)

Unfortunately, although civil procedure rules establish a framework for proceeding with a case, it may take a very long time for a case to work its way through the system. One reason for the delay is the rising number of criminal cases, which seem to be pushing civil cases to the back of the court docket. Between 1984 and 1994, for example, criminal caseloads in the state courts rose 35 percent.

The civil law is a critical part of society, and you cannot take full advantage of its protections without understanding how it operates.

Another reason for the "snail's pace" of certain civil cases is their complexity. Cases involving alleged injury from environmental contamination or tobacco involve many, many plaintiffs and defendants (and lawyers) and may take 10 years or more to resolve.

One way to avoid a trial is to try to settle a dispute. Before a lawsuit is filed—but sometimes after—most parties try to negotiate a settlement in order to save time and money and, perhaps, spare one or both parties from emotional hardship. Usually, such efforts are voluntary, but many courts require parties to try to settle a case rather than going to trial.

In fact, most civil cases are settled prior to trial. Common examples of *alternate dispute resolution*, or "ADR"—alternatives to civil trials—are mediation in family disputes and arbitration in which sports contracts or striking union workers are involved.

Civil Law and You

The civil law is a critical part of society, and you cannot take full advantage of its protections without understanding how it operates. For example, to ensure that a potential defendant does not have to worry about being sued at some time far in the future, almost all legal actions, civil and criminal, have a statutory time beyond which a plaintiff cannot bring a lawsuit. This time limit is called a "statute of limitations."

Remember the leaky roof? If your roof contractor doesn't repair your roof as he agreed to, you may decide to sue. This would be an action for breach of contract. The typical statute of limitations for contract actions is six years. If you don't sue the contractor within six years, you can *never* sue him for breaching the contract to repair your roof. In legal terms, your claim is "stale" and you have forfeited your right to sue.

How can civil law affect you? Just look at these examples—

Contract Law: You have just purchased your first car. As most likely required by the law of the state in which you live, you obtain an insurance policy on the car from an insurance company that provides auto insurance. (Some insurers may provide only health insurance or life insurance.)

One day, an engine fire destroys your car. Your insurance policy specifically says that the insurance company will pay you the value of your car or replace it with one of equal

value if it has been destroyed by fire. As long as you didn't do something to cause the fire, the insurance company must pay you for your loss.

Environmental Law: Vehicle-emission standards affect the amount of pollution in the air that you breathe. But vehicle manufacturers have been arguing for a long time that tightening emission standards is not necessary and will dramatically increase the price of cars. Since the ongoing battle between vehicle manufacturers and the government over these standards affects both your health and your wealth, this well-reported area of civil law is one you might want to watch.

Family Law: Your best friend's parents get divorced. The court gives custody of your friend's sister to his mother, while your friend goes to live with his father. But your friend and his sister want to grow up together. Depending on the circumstances, they may be able to get assistance from a judge and obtain their own attorney to challenge the custody settlement.

Intellectual Property Law: You are an aspiring writer who posted a story on the Internet. Under copyright laws, this story belongs to you, and you have noted that the story is yours with a copyright line. However, a few months after your posting, you see your story, with a different title and under someone else's name, published in a magazine. This person has apparently pirated your story and may be liable for "copyright infringement." The magazine's publisher also may be liable if the publisher knew that the person claiming to be the author did not really write the story. You may sue for damages involving the initial magazine appearance of your story as well as any rights that may have been sold for republication in print or any other medium, including TV and film.

Tort Law: Suppose you are a basketball star who was late for practice one day. You rushed out your door, tripped over your neighbor's dog, and broke your wrist. You consider suing your neighbors. Whether or not you win your lawsuit will depend on who is at fault. Are your neighbors to blame? Or should you have been paying attention to where you were going?

If you do sue, you will be the plaintiff and your neighbors will be the defendants. You or your attorney will allege that your neighbors should have kept their dog in their own yard. Because they did not, you broke your wrist, incurred medical expenses, and, worst of all, missed the entire basketball season. Your complaint asks the court to order your neighbors to pay you not only for the medical expenses (actual damages) related to your injury, but also for your "pain and suffering" in missing the basketball season. In legal language, you have stated a cause of action for negligence—a type of tort.

The neighbors may claim that, even though their dog was at your door, your injuries were at least partially your fault because you didn't look where you were going, and witnesses say that the dog was barking loudly at the time. The claim by a defendant that a plaintiff is partly at fault for his or her injuries is called "contributory" or "comparative" negligence.

After hearing all the evidence, the judge or jury, as the case may be, makes a decision. There are three ways your case may be decided. . .

After hearing all the evidence, the judge or jury, as the case may be, makes a decision. There are three ways your case may be decided:

You win: There was no possible way you could have seen the dog, which was a Chihuahua. The court orders your neighbors to pay you the damages that you asked for in your complaint.

You lose: There was no possible way you could have missed the dog, which was a Great Dane. The court enters judgment for the defendant.

You win and lose: You might have seen the dog, which was a cocker spaniel. So you are partially at fault, and the court orders your neighbors to pay you less than the damages you sought in your complaint. ♦

Another Opinion

MY DAD CAN SUE YOUR DAD!
YEAH? WELL, MY DAD CAN COUNTERCLAIM AGAINST YOUR DAD FOR COMPENSATORY AND PUNITIVE DAMAGES!
ANN TELNAES

BY ANN TELNAES. © 1997 Ann Telnaes. Reprinted with special permission of North America Syndicate.

Civil Procedure

From lawsuit to final decision

Robert Byer

Update on Law-Related Education, 21.3, 1997, pp. 10–11. © 1997 American Bar Association.

Civil procedure developed over the centuries because of a need for orderly relations between the parties and lawyers involved in resolving, or litigating, a civil case from the time a lawsuit is filed through the final judgment. It provides the lawyers who shape litigation with rules to abide by in the process. It does not relate to substantive aspects of the law (such as contracts, insurance, or torts, for example).

Civil procedure is so extensive that encyclopedia-length treatises have been written about it. Law students must study it for at least a year or often two. Civil procedure is the result of a continuing evolutionary process. Every day, it is refined and adjusted to meet the needs of those involved in the U.S. court system.

Civil procedure's requirements are found mainly in the Federal Rules of Civil Procedure. Under the **Rules Enabling Act of 1934,** Congress granted the Supreme Court comprehensive procedural rule-making power that resulted in the **Federal Rules of Civil Procedure of 1938.** These rules govern all civil actions in the U.S. district courts as well as adversary proceedings in federal bankruptcy courts, and most states have modeled their own procedural rules after them. But statutes and precedents, or prior decisions by courts, also govern. Civil procedure is best explained by examining the concepts as they might arise in a hypothetical case.

Related activities can be found on page 52.

Assume that a person who lives in New York travels to Florida and is injured on an amusement park ride. The injured person claims that the park was careless in operating the ride, thereby causing the injury.

What to do? First, it must be determined that a judge has authority—or jurisdiction—to decide a case. The chart demonstrates the entire process through to trial.

Subject matter jurisdiction involves the question of whether a court has the power to decide a case. The question of subject matter jurisdiction for the hypothetical situation is "May the plaintiff, the allegedly injured party, file suit in a federal court or a state court?" It depends. Congress has given federal courts subject matter jurisdiction in "diversity" suits, which apply to cases between citizens of different states in which more than $75,000 in damages are involved. But a state court may also have jurisdiction. When both state and federal courts would have subject matter jurisdiction, they have concurrent, rather than exclusive, jurisdiction.

Personal jurisdiction is another matter entirely. This procedure determines whether a defendant may be sued in a court—state or federal—that is located in a state other than the one in which the defendant lives or does business. In the hypothetical case, the injured party could file suit in New York only if that state may exercise personal jurisdiction over the Florida defendant. This could occur if the defendant is a New York corporation, had headquarters in New York, or does a sufficient amount of business in New York. Otherwise, the suit would have to be filed in Florida.

Robert Byer is a partner in the Pittsburgh office of Kirkpatrick & Lockhart LLP, where he concentrates in appellate practice, civil litigation, and administrative law. He was a judge of the Commonwealth Court of Pennsylvania from June 1990 until January 1992. He is a member of the Academy of Trial Lawyers of Allegheny County, a life fellow of the American Bar Foundation, and a life fellow in the Pennsylvania Bar Foundation.

Venue is similar to jurisdiction, but venue is used to determine in which branch of a particular court a case must be filed. If there is more than one federal court district in a particular state, the venue requirement means that a plaintiff must file the case in the appropriate federal district. In state courts, the venue requirement might limit plaintiffs to filing suit within specified counties.

Pleadings are the first phase of a lawsuit after jurisdiction and venue have been determined. The rules governing pleadings regulate how each party—plaintiff and defendant—informs the other party of its version of what happened. The plaintiff will file a complaint, which in the example would allege that the defendant's negligence—carelessness—caused the accident. The pleading will state what injuries were suffered and the types of damages sought—pain and suffering, medical bills, or lost wages, for example. The defendant will then file an answer that may deny some of the facts, assert that the plaintiff was not as badly injured as was claimed, or assert that the defendant was careless—standing up during the ride after having been instructed to stay seated until the ride was finished.

Discovery refers to the method by which each party, after the pleadings are completed, learns more about the other party's case. Each party may serve written questions, known as "interrogatories," requiring the other party to provide additional details. Each party may also require the other to provide documents, such as medical bills, hospital records, accident reports, or safety inspections, by serving a "request for production." In addition, each party is entitled to call on the other party or any witnesses for a "deposition"—a procedure outside of court in which lawyers ask individuals questions under oath.

The purpose of discovery is to avoid surprises by allowing each party to learn everything possible about the other party's case before trial. As a result of discovery, most civil cases are settled before trial because each party has the information about the strengths and weaknesses of the case.

Pretrial conference is an informal meeting of the parties and the judge in the judge's chamber. If a case is not settled at this point, the judge may call a pretrial conference. Often settlements result from these conferences, which also serve to eliminate, narrow, or more clearly formulate issues in the case.

Motions practice refers to the manner in which parties obtain rulings from the court on various issues before trial. In the example, if the plaintiff filed suit in New York and the defendant was not located or did not do business in New York, the defendant could move to dismiss the case for lack of personal jurisdiction. Motions may be filed during the initial or pleading stages of a case; after the pleadings; and before, during, and after discovery. Motions are also the manner in which each party may contend that the other party is not complying with a rule or other requirement of civil procedure. This allows a court to regulate the conduct of the case and of the lawyers in an orderly fashion.

Trial is the procedure in which a case that has not been settled and cannot be decided in a pretrial conference is decided. Most civil trials are decided by a jury, but some cases are decided by a judge without a jury. At trial, each party conducts direct and cross-examination of witnesses and introduces exhibits in order to present its version of the facts.

The trial ultimately results in a verdict, and that verdict eventually becomes the final judgment of the court. After the judgment is entered, the losing party may appeal to a higher court. The losing party may further contend that a mistake was made at trial, and as a result, there should be a new trial. The losers may further argue that the law requires the judgment to be in their favor rather than in the favor of the winning party. Although courts of appeals sometimes change a verdict and judgment, in most cases, they do not change the decisions of the lower courts.

PERSPECTIVE

Double Jeopardy—Another Look

Are civil law and the Fifth Amendment in conflict?

Dianne K. Dailey and Linda M. Bolduan

Update on Law-Related Education, 21.3, 1997, p. 12. © 1997 American Bar Association.

** * * "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb" * * **

A Note to Teachers: The Fifth Amendment to the United States Constitution guarantees that a person shall not "be twice put in jeopardy" for the same offense. But we all know that persons can be tried for murder and then be sued by the family of the murder victim for wrongful death. How can that be? What happened to the constitutional protection against double jeopardy? This *Update* perspective can help clarify this issue for you and your students.

Dianne K. Dailey is a shareholder in the northwest regional law firm of Bullivant, Houser, Bailey, Pendergrass, and Hoffman in Portland, Oregon, where she chairs the Insurance Coverage Practice Group. She is also chair of the Tort and Insurance Practice section of the American Bar Association and a member of the Defense Research Institute, Federation of Insurance and Corporate Counsel, International Association of Defense Counsel, and the Oregon Association of Defense Counsel.

The key to answering questions about double jeopardy is understanding that double jeopardy applies only to criminal actions, not civil actions. A proceeding is criminal for purposes of double jeopardy if the end result is a sanction intended as punishment, such as imprisonment. In a criminal case, the government prosecutes the offender. The double jeopardy clause forbids further criminal prosecutions for the same crime after conviction or acquittal and also protects against multiple punishments for the same crime.

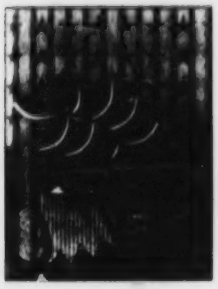
In a civil action, one person typically sues another to enforce private rights or to seek redress from some wrong. Examples are breach of contract, negligence, and wrongful death.

Even though a criminal action and a civil action are based on the same facts, the constitutional right to be free from double jeopardy does not prevent the civil action. Suppose, for example, that Mr. Smith's house burns down. He asks his homeowners' insurance company to pay for the loss. Unfortunately for Mr. Smith, fire investigators determine that he burned down his own house on purpose just to get the insurance money.

The state brings charges against Mr. Smith for the crime of arson. At the same time, Mr. Smith's insurance company files a civil suit against Mr. Smith. The insurance company claims that it does not have to pay because Mr. Smith intentionally burned down his house, and the company does not pay for losses from intentional acts. The insurance company will likely win its lawsuit, so it will not have to pay Mr. Smith for the loss of his house. The company's civil suit against Mr. Smith does not infringe on his constitutional right to be free from double jeopardy.

Another example is an auto accident. This time, suppose that Mr. Smith hit and severely injured a pedestrian after speeding through a red light. The state might bring criminal charges against Mr. Smith for reckless driving. At the same time, the injured pedestrian (the plaintiff) might bring a civil action against Mr. Smith (the defendant), perhaps seeking money damages for medical expenses and wages lost during the long months the injured party could not work. In a case such as this, the plaintiff might even ask for punitive (in addition to actual) damages to punish Mr. Smith for his wrongful act. Again, the civil suit does not infringe on Mr. Smith's constitutional right to be free from double jeopardy.

The important concept to remember is that the Fifth Amendment's guarantee against double jeopardy applies to criminal actions, not civil actions. That is why our hypothetical Mr. Smith can be prosecuted for his crimes and also be sued by the victims of those crimes. ♦



Tort Law and the Civil Jury

Torts are wrongful acts that could result in civil action.

Keith A. Pittman

Update on Law-Related Education, 21.3, 1997, pp. 13–16. © 1997 American Bar Association.

What Is a Tort?

Many people's answer to the question of "what is a tort" might be "some kind of cake" (as in *torte*). Even if they looked *tort* up in *Webster's Dictionary*, they could still be confused: "**tort** ... fr. L, neut. of *tortus* twisted, ... a wrongful act, injury, or damage (not involving a breach of contract) for which a civil action may be taken." That tells us that a civil action, i.e., a lawsuit, may be filed. But what does "wrongful act not involving a breach of contract" mean? A breach of contract is the failure to perform a promise.

Tort was once a synonym for *wrong*. Though it eventually dropped out of everyday use, the word *tort* has remained a legal term meaning "a wrongful act." But what makes a wrongful act one that you can be sued for? Is an act wrongful only when there is a specific law against it? Or, is an act wrongful simply because it causes harm or injury? Can there be harmful acts that are not prohibited by a specific law for which a person can be sued? Are there unlawful acts, such as criminal acts, that should not be the basis for a civil lawsuit? If it's not just a question of pre-existing law, what criteria should be used to decide whether a person can be sued: morals, economics, social norms, science, history? These are some of the questions that are part of the discussion about what a tort is.

The law of torts decides whether you are liable for any harm that comes to others as a result of your actions. If you are liable, you are required to compensate the wronged party, usually by paying money damages.

"The business of the law of torts is to fix the dividing lines between those cases in which a man is liable for harm which he has done, and those in which he is not. ... All the rules that the law can lay down beforehand are rules for determining the conduct which will be followed by liability if it is followed by harm,—that is, the conduct which a man pursues at his peril." (Holmes 1963)

Tort law encompasses a wide range of harmful conduct—conduct causing personal injury, wrongful death, property loss, violation of a constitutional right, dignity loss, business loss. It is sometimes considered a "legal garbage can" for claims that cannot be easily included in the areas of contract, criminal, property, and government law. We'll consider what a tort is by looking at (1) how certain types of conduct came to be torts, (2) the major areas of tort law, and (3) the importance of administering tort law through a civil jury.

See Teaching Strategies for this article on pages 36 and 44.

Tort Law's Roots

Tort law grew out of societies' need to prevent vengeance and blood feuds. Ancient societies recognized that people seeking revenge on those who supposedly wronged them might injure innocent persons and waste their energies on destructive conduct. Societies decided to stop such conduct by making it first optional, and later mandatory, for people to have the right to "buy off" the feud. For example, if someone burned down Joe's house, Joe had to make a claim for arson instead of seeking revenge on the suspected arsonist.

Early claims were solely for intentional wrongs; actions were even named for intentional acts such as deceit, slander, and conspiracy. At first accountable only for the intended act, persons soon became liable for the foreseeable consequences of their conduct. (*Foreseeable* means "known beforehand"). Another step in the evolution of tort law was the ability of those wronged to make claims for injuries resulting from not only intentional acts but also negligent or careless acts.

The areas in which legal responsibility first arose reflected the development of societies. Early liability often involved injuries resulting from or to one's animals (cattle, dogs, etc.) or

Keith A. Pittman, a former high school teacher, is now an associate with Butler, Wooten, Overby, Pearson, Fryhofer & Daughtery, a plaintiffs' firm with offices in Atlanta and Columbus, Georgia.

from or to one's property, thus reflecting the agrarian nature of the society. Liability grew to include injuries resulting from the increasing commercial nature of societies, i.e., for wrongs resulting from the transportation of goods or involving public establishments such as an inn. Also, the development of tort law often revolved around the central question of who could, and therefore was going to, pay for the injuries. A question arising from early commerce was, in the case of a servant's wrongful act, should liability attach to the master in whose name the business was being enacted or the servant who actually did the wrong? Out of these concerns has developed the law of agency, involving whether someone is a principal (or master) or an agent (or servant). Still applied today is the doctrine of *respondeat superior* ("let the master answer") under which a principal is liable for the wrongs of his or her agent committed in the course of the principal's business.

Tort Law's Major Areas

Though many types of harmful conduct can be considered tortious, we'll focus on the major areas of tort law involving injuries to persons.

Personal Injury and Wrongful Death

Much of tort law focuses upon the harm resulting from the complained-of act. If Joe does something that results in no harm to someone else, then there are generally no grounds for a lawsuit. Because social interaction holds great potential for injury and death, it is inevitable that a great body of law has developed around how to compensate people for their injuries. (For example, much of our civil law for the use of automobiles centers upon how to attach blame for the damages that result from traffic collisions.) If the harmful consequences of an act actually cause someone's death, not only is there a need to compensate for the loss of life, but there may also be a punitive aspect of such legal claims.

Tort law is one of our society's responses to the social problem of injury and death. Injury and death are not only problems for the persons so afflicted but also for those immediate to them and to society through the social loss of a person's productivity and other losses and costs that are generated. Societal costs pose a problem in how they're distributed to the uninjured. Does the government pick up the tab? How should unpaid creditors or rising insurance rates be handled? Thus, tort law not only aims to control or regulate harmful behavior but also seeks to assign responsibility for the result of behavior and, as part of that, to compensate the victims of wrongful acts. Tort law determines when loss should be shifted from one person to another or whether the loss should remain where it has fallen if the harm truly results from an "accidental" occurrence.

Tort law is one of our society's responses to the social problem of injury and death.

Intentional Torts

Intentional torts arise from purposeful activity; you act intentionally if you desire to cause the consequences of your act or believe that those consequences are substantially certain to result. Thus, even though you don't intend to do harm, you may still be acting intentionally if your conduct is substantially certain to bring about harm.

The main intentional torts to persons are battery, assault, false imprisonment, and intentional infliction of mental distress. Battery is an intentional act that causes physical harm to another person through contact that the person did not consent to. Assault also addresses the harm of offensive contacts. When a person is in fear of unwanted physical contact, he or she has been assaulted. False imprisonment, or false arrest, is the tort of improperly restraining or confining an individual. Such invasion of a person's right to freedom of movement can result from physical barriers or even intimidating threats of physical force. The tort of intentional infliction of mental distress usually addresses extreme or outrageous conduct that intentionally causes a person to suffer mental disturbance.

Negligence

The concept of negligence underlies much of tort law. *Negligence* is "failure to use ordinary care, or carelessness." Generally, negligence is measured by the "reasonable man" standard. An act is negligent if a reasonably careful person would not have acted in the same way under similar circumstances. Often the discussion of negligence centers on the idea of duty, that is, that every person has a duty to exercise ordinary care so that injury to others does not result from his or her conduct. For there to be negligence at law, there must be a duty to act with ordinary care and a breach of that duty that causes harm. If all of those elements are not present, then the negligence is not grounds for a lawsuit. Of course, the standards are capable of widely varying application. For example, whereas a lifeguard may have a duty to save someone who is drowning, an individual walking down the beach and spotting a drowning person likely would not have the same duty.

Professional Malpractice

The lifeguard who may have a heightened duty to a drowning individual is similar to the professional who may be sued for professional malpractice. Professional malpractice claims involve the usually higher standard of care demanded from a professional, not an ordinary, individual. For example, in the medical arena, malpractice can

apply to the diagnosis, treatment, or other performance of medical services. If a doctor's performance falls below the usual practices of the profession, then he or she may have committed malpractice and thus be liable for the harmful consequences of his or her misdiagnosis or maltreatment of the patient.

Strict Liability

Strict liability is the idea of liability without fault, i.e., if harm results even when someone did everything he or she was supposed to do, then he or she is still liable for the harmful results. Persons involved in abnormally dangerous activities may be held strictly liable. For example, someone who owns wild animals or has control of them may well be liable for any injuries the animals may cause. Similarly, anyone engaged in an ultrahazardous activity that has a great risk of harm may well be held liable for any harm that may result, even if he or she has not done anything particularly blameworthy.

Since tort law is meant to address when liability should attach to members of the community who have harmed other persons, who better to judge whether community standards have been met than other members of the community?

Libel, Slander, and Invasion of Privacy

These torts seek to compensate persons for dignity losses. Libel generally refers to written and other publications that injure someone's reputation. Slander is the verbal equivalent of libel. Invasion of privacy can involve activities such as the improper publicizing of a person's private life or an intrusion into a person's private activities that results in humiliation or shame. Invasion of privacy also could include someone using or otherwise exploiting a person's personality or name without permission.

Misrepresentation

Persons often refer to the tort of misrepresentation as fraud. A misrepresentation is anything intended to deceive or mislead a person so that he or she acts upon it to his or her detriment. Such conduct is often considered particularly reprehensible and may result in punitive or exemplary damages beyond any compensatory damages. Punitive damages are given to punish someone for particularly wrongful conduct and to send a message to others as a deterrence against so acting.

Means to Justice: The Civil Jury

Since tort law is meant to address when liability should attach to members of the community who have harmed other persons, who better to judge whether community standards have been met than other members of the community? The right to trial by jury is first and foremost concerned with justice. Since tort law is society's attempt to replace individual "justice" (vengeance) with community justice, the right to trial by jury is inevitably intertwined with the fairness of the tort system. A brief review of the history of the right to trial by jury establishes this right's importance in making persons feel that they have received a fair result, i.e., justice, after their day in court.

On June 15, 1215, English nobles forced King John to sign the Magna Carta, a charter guaranteeing certain rights to the English people. Among its articles, the Magna Carta provided that "No free man shall be seized, or imprisoned, or dispossessed ... excepting by the judgment of his peers." The right to a trial by jury of members of the greater public was meant to rein in the previously arbitrary nature of royal justice. However,

McEnglish Law

It all began in the mid-1980s, when a group of environmentalists published a leaflet entitled, "What's wrong with McDonald's? Everything they don't want you to know." The suit, filed in England, accused the fast-food giant of everything from causing starvation in Third World countries to the destruction of rain forests.

McDonald's for the most part won a libel suit, receiving a judgment for about $98,000, but the court ruled that the leaflet was truthful when it accused the chain of paying low wages, treating animals cruelly, and exploiting children in its advertising campaigns. This was a victory? The trial was the longest in English history, lasting 313 days. It cost the company $16 million to pursue. In English cases, the losers pay their own costs and those of the winner, but the pamphleteers, who defended themselves because they had no money for attorneys, are not likely to pay either the judgment or the costs.

The greater cost may be in damaged public relations. The David and Goliath image of plaintiffs and defendants led to differing conclusions as to whether this case was really about McLibel or McCensorship.

Adapted from ABA Journal, *August 1997, p. 22.*

the rights guaranteed in the Magna Carta eroded over time in Great Britain. In fact, the migration of many British colonists to the New World resulted from the loss of confidence in the justice being handed out by the British government. Many charters for the American colonies guaranteed the protection of the Magna Carta to reverse the erosion of personal liberty symbolized by the weakening of the right to a trial by jury.

The right of trial by jury was also guaranteed in many original state constitutions that were passed in 1776 and 1777.

Following the battle of Lexington in April of 1775, Benjamin Franklin, Thomas Jefferson, and others drafted the Declaration of the Causes and Necessity of Taking Up Arms. One of the complaints against the British colonial government was that it often deprived the American colonists of their right to trial by jury. This deprivation was given as a principal reason for the colonies' rejection of the Offer of Reconciliation made by Lord North, the British Prime Minister.

The right of trial by jury was also guaranteed in many original state constitutions that were passed in 1776 and 1777. Many famous patriots commented on the importance of the civil jury system. For example, Thomas Paine, the author of *Common Sense*, wrote that "A man has a natural right to address himself whenever he is injured, but the full exercise of this, as a man's right, would be dangerous to society, because it admits him a judge in his own cause. ... Therefore, the civil right of redressing himself by an appeal to public justice, which is the substitute, makes him stronger than the natural one, and less dangerous."

Since the determination of the facts of a case is generally a matter of deciding who's telling the truth, the founders of our country jealously guarded the right of the people to participate in such decisions. By the time this country was formed, the jury had become an impartial group of persons who, under oath, apply the law of evidence and decide the facts of a case in private deliberations according to the law as given by the judge. At the Constitutional Convention in 1787, delegates voiced strong objections to the failure of the proposed Constitution to guarantee the right of trial by jury. The objections were part of the overall debate about personal liberty that culminated in the adoption of the Bill of Rights. Thus, the Seventh Amendment to the United States Constitution provides that "In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

The main reasons for trial by jury are that it—

1. *prevents popular distrust of official or bureaucratic justice by giving the citizens a share in the administration of justice:* others have even stated that jury trial prevents the corruptive and arbitrary air that might attach to governmental decision making. (It's easier to influence one known to be the decision maker than twelve people from the greater community.)
2. *educates citizens in the administration of law* and thus better helps citizens consider issues of politics and good government. As stated by Aristotle, "If liberty and equality, as is thought by some, are chiefly to be found in democracy, they will best be attained when all persons alike share in government to the utmost."
3. *provides flexibility for legal rules:* the jury, in its private deliberations, can (and does) adjust the law to the justice of a particular case.
4. *improves the quality of the verdict* based on the reconciliation of varied temperaments and minds in arriving at a fair and just result.

Present United States Supreme Court Chief Justice William H. Rehnquist has summarized the importance of the jury trial in *Parklane & Hosiery Co. v. Shore*. "The founders of our nation considered the right of trial by jury in the civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign. ... [Their] concerns for the institution of jury trial ... led to the passage of the Declaration of Independence and to the Seventh Amendment. ... Trial by a jury of laymen ... was important to the founders because juries represented the layman's common sense ... and thus kept the administration of law in accord with the wishes and feelings of the community (439 U.S. 322, 340, 343–44 [1979])."

Perhaps it is easier to answer what tort law is than what a tort is. Tort law, administered by a civil jury, is simply a group of laws that sets out when and to what extent persons are legally accountable for the harmful consequence of their acts according to the standard of conduct required by their community.

Resources

Beck, Emily Morison, ed. *Bartlett's Familiar Quotations*, 15th ed. Boston: Little, Brown and Company, 1980.

Holmes, Oliver Wendell. *The Common Law*. New York: Little, Brown & Co., 1963.

Schwartz, Bernard. *The Roots of the Bill of Rights*, Vol. 2, 315–16. New York: Chelsea House, 1980.

Wigmore, John Henry. "A Program for the Trial of Jury Trial," 12 *J. Am. Jud.* F.S.C. 166, 169–171 (April 1929). ♦

141

BEST COPY AVAILABLE

PERSPECTIVE

Academic Controversies as a Vital Instructional Tool

David W. Johnson and Roger T. Johnson

Update on Law-Related Education, 21.3, 1997, pp. 17, 23. © 1997 American Bar Association.

A Note to Teachers: Many legal issues involving civil law are controversial, including the one hotly argued by lawyers Wally Pflepsen and Marianna Smith in the following debate, "Is American Society Too Litigious?" Such debates are useful in demonstrating to students not only that the "experts" can widely disagree, but how disagreements can be handled in a civil manner that can bring about a productive end. This *Update* perspective by David W. Johnson and Roger T. Johnson makes the case for using what they term *academic controversies* as an instructional tool. The Teaching Strategy on page 41 by the same authors provides an opportunity for you and your students to participate in an academic controversy, as does the Student Forum by Rita G. Koman on page 47. Both have to do with controversies surrounding aspects of our civil justice system.

Thomas Jefferson and the other founders of the American democracy based it on the premise that "truth" will result from a free and open discussion in which opposing points of view are advocated and vigorously argued before a decision is made. Every citizen is given the opportunity to advocate for his or her ideas. Once a decision is made, the minority is expected to willingly go along with the majority because they have been given a fair and complete hearing. To be a responsible citizen in our democracy, therefore, an individual needs to master the process of forming a position, advocating it, critically challenging opposing positions, reaching a joint decision, and ensuring that everyone involved is committed to implementing the decision made, regardless of whether one initially favored the alternative adopted or not.

In schools, this process is called "academic controversy." There are three ways that the academic controversy procedure is important for educating students about civil justice and other subject areas. First, it is through participating in academic controversies that students learn the skills they need to be responsible citizens of a democracy. Second, academic controversies provide a procedure for resolving civil justice problems without going to court. Third, participating in academic controversies increases academic learning and other instructional objectives.

The academic controversy procedure is the heart of effective decision making. In order to make good decisions that are fully implemented, students must give each alternative course of action (a) a fair and complete hearing and (b) a "trial by fire" in which they critically analyze the alternative to clarify its strengths and weaknesses. In addition, participating in academic controversies teaches students essential problem-solving skills that they will use for the rest of their lives. Students learn how to research and form the "best case" for a position, present a persuasive and convincing argument for it, critically analyze and refute opposing positions while rebutting attacks on their own position, see the issue from different perspectives, and synthesize the best reasoning to reach a group consensus on the best judgment possible. It is important for students to understand that the purpose of advocacy and criticism is not to win but to clarify the strengths and weaknesses of various courses of action. In this way, they can reach a joint agreement about what represents the best-reasoned judgment that can be made at this time.

Controversy exists when one person's ideas, information, conclusions, theories, or opinions are incompatible

continued on page 23

David W. Johnson is a professor of educational psychology at the University of Minnesota in Minneapolis where he holds the Emma M. Birkmaier Professorship in Educational Leadership (1994–1997). He is co-director of the Cooperative Learning Center.

Roger T. Johnson is a professor of curriculum and instruction at the University of Minnesota. He is co-director of the Cooperative Learning Center.

Is American Society Too Litigious? Yes

Between 18 million and 30 million civil cases are considered each year.

Waldemar (Wally) J. Pflepsen Jr.

Update on Law-Related Education, 21.3, 1997, pp. 18, 20–21. © 1997 American Bar Association.

The most significant statistic to be considered when assessing whether our society is too litigious is the number of civil cases in the courts each year. Every year between 18 million and 30 million civil cases move through the court system. Americans have to carefully evaluate whether this litigious activity reflects the best allocation of resources and energies.

So Many Lawyers

By some estimates, the United States has 70 percent of the world's lawyers. Critics of that estimate say that when one considers that nonlawyers in other countries do much of what lawyers do here, the United States has no more than half that, or 35 percent of the world's lawyers. Even if this assertion is true, having more than one-third of all the world's lawyers is a startling percentage in itself. Defenders of the litigious system in the United States explain that the historical emphasis on individual rights and liberties distinguishes this nation from totalitarian regimes, in which lawyers and lawsuits are not nearly so prevalent. Americans are rightfully proud of their history, yet no one can say that American lawyers are as busy as they are because they are litigating fundamental rights and liberties. Nor given the pervasive violence in America, is it likely that access to civil courts actually discourages citizens from taking the law into their own hands.

Wally Pflepsen is a litigation partner in the Washington, D.C., office of Jorden Burt Berenson & Johnson LLP. He frequently represents insurers and other corporate clients in complex litigation matters. He is the 1997–98 chair of the Corporate Counsel Committee of the ABA Tort and Insurance Practice Section, a former chair of the committee's Litigation Management Subcommittee, and a member of the ABA Section of Litigation.

So Many Lawsuits

People who contend that Americans are not suit-happy like to argue that the costs of litigation are small in comparison to gross measures of the country's productivity. They cite such studies as those that show that medical malpractice suits add less than 1 percent to our total health care expenditures. This approach brings to mind an apt comment by the late U.S. Senator Everett Dirksen, who when asked to favorably consider a "small" item in the federal budget noted, "A billion here, a billion there, and pretty soon you're talking about real money." Given that in 1995 total health care spending amounted to nearly one trillion dollars (or over $3,600 per person), even 1 percent represents a huge expenditure. If a young man or woman becomes a medical doctor today, he or she has a good chance of being sued: 40 percent of doctors and fully 70 percent of obstetricians are sued during their careers, according to the American Medical Association. This revelation seems at odds with most Americans' high opinion of the medical care they enjoy. Moreover, doctors win 70

continued on page 20

See the Student Forum on page 47 for a technique to help students debate the issue.

Is American Society Too Litigious? No

Divorce, small claims, and property rights, not torts, account for the bulk of cases.

Marianna Smith

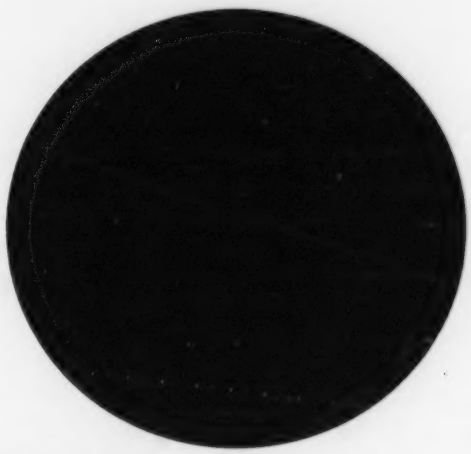
Update on Law-Related Education, 21.3, 1997, pp. 19, 22–23. © 1997 American Bar Association.

Is our society too litigious? People who answer yes to this question support their position by comparing the numbers of lawsuits filed in the United States with the numbers filed in other countries or in earlier times in this country. While those numbers are interesting, they do not answer the question. Some even note that the number of attorneys in the United States is evidence that American society is too litigious. The United States does have more licensed attorneys than many other countries. However, many countries do not require lawyers to be licensed unless they appear in court. For example, Japan has only 16,000 licensed attorneys, prosecutors, and judges. Yet, 70,000 legally trained individuals who do not have attorney's licenses perform traditional legal work in Japanese corporations.

Many developed countries have large tax-funded social welfare systems that help pay for injuries resulting from wrongdoing. The United States, however, has a tradition in which the wrongdoer pays for the injuries he or she causes. As a result, Americans turn to the courts to help assess who is responsible for a wrongdoing. It is easy to cite isolated absurd cases and conclude that all Americans filing lawsuits are ridiculous or litigious. But common sense and an examination of the types of cases in our courts can help answer the question—Why are the courts so busy?

For information on state court caseloads and civil lawsuit filings, see the charts on page 53.

Marianna Smith is an attorney living in Bethesda, Maryland. She is a member of the Board of Governors of the American Bar Association, a member of the Board of Directors of Parsons Brinckerhoff, and owner and CEO of Industrial Petroleum Supply, Inc. During her legal career, Smith has been a dean and professor of law, an executive director of several not-for-profit organizations, and a litigation consultant to law firms.



Criminal Docket

During the last two decades, there has been a dramatic increase in the number of criminal cases brought by the government against adults accused of crimes and in the number of juvenile cases against young people arrested for criminal behavior. There has been an even greater growth in the number of traffic cases filed by government agencies. Criminal, juvenile, and traffic cases make up almost 80 percent of the caseloads in state courts. Because these cases often involve fines and possible jail sentences, it is critical that courts are used to protect the constitutional guarantees. In the United States, a criminal defendant has the right to a court-appointed attorney and a speedy trial by jury.

Civil Docket

Domestic Cases

State courts report that 25 percent of their cases deal with divorce, child custody, and child-support payments following a divorce. Certainly, people cannot be considered too litigious because they go to court to seek divorce, custody of children, or child-support payments. In earlier

continued on page 22

Yes . . . continued from page 18

percent of their lawsuits. Doesn't this suggest that too many meritless suits are being brought against them? Doctors do sometimes make mistakes; no one is suggesting that they be made immune from suit for those mistakes. But are we content to live with the current environment? Some states have said no and are implementing limits on awards for certain components of damages such as pain and suffering or are requiring evaluation of malpractice claims by independent boards of review.

Punitive Damages

Plaintiffs, if successful, may obtain compensatory damages as recompense for their injuries, including pain and suffering. In most states, a plaintiff also may seek punitive damages, which are designed to punish the wrongdoer and deter future outrageous behavior. Many of the most sensational jury verdicts involve large punitive damages awards. A woman burned by spilled coffee purchased at McDonald's was awarded $160,000 in compensatory damages and $2.7 million in punitive damages. Although the punitive damages were subsequently reduced to $480,000 (three times the compensatory damages), the promise of such large damage awards encourages litigation by motivating injured parties and their lawyers alike. A doctor in Alabama who sued over a retouched paint job on his new BMW received $4,000 in compensatory damages and $4 million in punitive damages from a state court jury. This case recently went to the United States Supreme Court, which found that the punitive damages award violated elementary notions of fairness guaranteed by the Fourteenth Amendment to the United States Constitution.

Punitive damages have an appropriate role in protecting Americans from unscrupulous behavior.

While some would argue that these two examples reflect a system that works as intended—since the punitive damages awards were substantially reduced—others would argue that there are flaws in such reasoning. Because not all large punitive damages awards are successfully reduced on appeal, the mere threat of unchecked punitive damages places great pressure on defendants to settle claims that otherwise should not be settled, encourages the filing of meritless suits for exactly the same reason, and causes drawn-out appellate litigation to obtain relief from outlandish awards.

Punitive damages have an appropriate role in protecting Americans from unscrupulous behavior. But across the country, many citizens are asking their state legislatures to pass laws to ensure that punitive damages awards will not have counterproductive results. Such laws seek to cap punitive damages at either absolute dollar limits (e.g., $500,000) or a multiple (e.g., three times) of the compensatory damages awarded. Some states have required significant portions of such awards to go to the state, as a penalty, rather than further enriching plaintiffs and their lawyers.

Invisible Impact

When businesses and individuals are faced with the possibility of unfounded, burdensome litigation, they logically react by shunning activity that gives rise to those risks. For example, many businesses refuse to give out any information about former employees other than dates of employment, lest they be sued for defamation. As a consequence, employers find it harder to avoid hiring problem employees. Smaller communities cannot find doctors to deliver babies, and schools and cities must curtail recreational programs and activities. Little League Baseball, Inc., reports that the threat of litigation makes it harder to find coaches: the league's liability insurance premiums increased by 1,000 percent in five years. Numerous studies can be cited that establish what the threat of frivolous litigation means—fewer jobs, less innovation, fewer products, and wasteful, defensive medical care. Opponents of measures to rein in litigation say this cost to society is justified by the benefits that flow from litigation, such as safer products. But does a product such as a common ladder need to be covered by no fewer than 140 federal regulations, which offer numerous grounds for lawsuits against the manufacturer, distributor, and retailer?

The constant threat of litigation also means that the path of safe conduct becomes increasingly more difficult to follow. Consider the brewery company that recently lost a multimillion dollar judgment (which included $18 million in punitive damages) to an executive who claimed he was wrongfully discharged. The executive was dismissed for allegedly sexually harassing a female employee. Had the company not fired this man, it could have been subject to a lawsuit by its female employee. Similarly, discretionary behavior, a lubricant that permits American society to function more smoothly, is inhibited in this increasingly formalistic, litigious environment. When an umpire refuses to allow a catcher—a juvenile female—to play baseball unless she wears a rules-mandated article of clothing specifically designed to protect the male anatomy, we have confused people too much. The same can be said about suspending a boy in early elementary school for playfully kissing a female classmate.

The constant threat of litigation also means that the path of safe conduct becomes increasingly more difficult to follow.

To discourage parties from filing frivolous lawsuits, many citizens want to adopt rules that would allow courts

to require the losing party to pay the attorney's fees of the prevailing party, similar to the approach used in England and elsewhere. As it stands now, a defendant who spends tens of thousands of dollars obtaining the dismissal of a frivolous lawsuit has little realistic chance of recovering those fees.

Lost American Values

Americans have been justly proud of their independence and self-reliance. Of course, a culture that emphasizes personal responsibility benefits from having a court system available to enforce that responsibility when legal obligations are breached. Yet, today, too many Americans are tempted to initially look to the courts as a means of resolving problems, frustration, or misfortune rather than relying on the courts as a last resort.

When teachers are routinely threatened with suits by parents and students over grading and disciplinary issues, we are sending the wrong message to our children. Handing disputes to the courts willy-nilly overlooks that a court's limited function is not to solve problems but to justly decide questions of law and fact. The "answer" the parties may obtain from a court, especially when combined with the emotional and financial drain the process exacts, often leaves even the "winner" disappointed. While many lawyers are very good at creative problem solving, the public should realize that lawyers may have a financial incentive that promotes, rather than downplays, a litigated result. This incentive is especially clear in the area of consumer class-action cases, in which lawyers are routinely awarded multimillion dollar fees as part of the class settlement, while their clients are given coupons or other benefits of limited or modest worth. Indeed, it has now become possible to become a class-action participant via the Internet without any prior consultation with a lawyer!

Americans have been justly proud of their independence and self-reliance.

Americans should not underestimate their own abilities to solve problems. As a new lawyer, I was impressed by a story, probably fictional, about two neighbors in a northern Michigan community who had a dispute over a drainage problem affecting their properties. Each went to see a lawyer about filing suit, and each was quoted a fee of around $5,000. Rather than making this outlay with no guarantee of a satisfactory result, the neighbors met and decided to have a tile drainage system installed, which corrected the problem for the total cost of $4,000. They split the cost and as a result saved thousands of dollars and hours of aggravation and frustration. They also avoided creating a lasting animosity between neighbors.

Americans should not underestimate their own abilities to solve problems.

Obviously, not all disputes lend themselves to such a happy ending. The point, though, is that Americans can accomplish a great deal, perhaps even more than they suspect at the outset, by using creative thinking and considering alternatives to the court system. The courts themselves in the last decade have started to promote mediation and other alternative dispute resolution procedures. Americans should welcome this trend, and if they do reach the point of needing to consult with a lawyer, require their lawyers to exhaust such alternatives before filing suit.

Despite its problems, our system works for the most part. But American society on the whole is too litigious.

Is the System Broken?

Despite its problems, our system works for the most part. But American society on the whole is too litigious. Americans should continue to promote experimentation—after all, this nation was founded as a great experiment—which will allow meaningful progress toward eliminating the current, wasteful consumption of resources while preserving basic values and rights. ♦

Mathematical Ruling

Some people claim to see images of one thing or another on tacos and office buildings, but toilet paper? In Great Britain, a mathematician who devised a design back in the 1970s recently spotted a similar pattern on toilet paper. His suit calls for the return of all copies of the pattern in addition to surrender or destruction of all articles and documents using the design. He also is seeking unspecified damages.

Adapted from ABA Journal, *July 1997, p. 16.*

No . . . continued from page 19

times in England, the church provided ecclesiastical courts for such domestic matters. However, the United States Constitution guarantees a separation of church and state, so state courts decide domestic cases.

Small Claims Cases

During the last 25 years, the number of cases filed in small claims courts has increased significantly. These cases account for about 20 percent of all civil cases filed in state courts. In small claims courts, individuals may represent themselves before a judge to resolve disputes involving relatively small amounts of money. This arrangement allows for prompt relief of a claim without all of the complicated documentation and preparation required in more complex cases. Many small claims cases involve landlord-tenant disagreements, disputes between consumers and merchants, or differences between neighbors. Some people consider these cases litigious because the claims are small and unimportant, and they think the claimant should try to resolve the case without the court's help. However, the cases are very important and serious to the individuals involved, and they have the right to seek the court's help in righting a wrong.

During the last 25 years, the number of cases filed in small claims courts has increased significantly.

Property Cases

About 17 percent of the cases filed in state civil courts deal with the rights of ownership or the use of property. These cases may involve disputes over issues such as the boundary lines of farms; the use of units in apartment buildings and office complexes; the right to take water, oil, or minerals from the ground; the ownership of valuable possessions, and the distribution of a deceased person's assets. Since the earliest times in America, people have valued the ownership of land and property rights. Many western movies and TV programs are based on disputes over property rights that were settled with guns and violence. Homesteaders and ranchers arguing over the use of property and fencing, disputed mine claims, and cattle rustling are examples of property rights violations portrayed on film. It is much better to file a case in court than to resort to violence to resolve claims to any given property. Our courts are designed to protect the interests of people making claims to their property.

About 17 percent of the cases filed in state civil courts deal with the rights of ownership or the use of property.

Contract Cases

Contract cases make up about 9 percent of civil cases brought in state courts. These cases often involve two businesses asking for the courts to resolve a dispute over the terms of their agreements. Our country's economy relies on businesses being able to create contracts for goods and services and being paid when they produce. When they disagree about the quality of the goods or the price paid for them, businesses may find it necessary to ask a judge to resolve the problems. For the smallest privately owned business and the largest corporation, the resolution of a contract dispute may make the difference between a profitable year and bankruptcy. Like businesses, individuals may find themselves in contract disputes, and they need equal access to the courts.

Tort Cases

Some people injured by the actions of others or by defective products file lawsuits in state courts. These cases are commonly called tort or personal injury claims because the injured party is seeking money damages from the defendant. Although these cases make up only about 6 percent of the courts' work, they attract a good deal of attention. This is the group of cases that most critics refer to when they say Americans are too litigious. But many studies have revealed that most Americans who are injured in accidents do not turn to the courts to seek compensation. The prestigious California Rand Institute found that

> With the exception of motor vehicle accident victims, only a minority, even among those who are quite seriously injured ... use legal mechanisms. In this respect, American behavior does not accord the more extreme pictures of litigiousness that have been put forward by some.
>
> Hensler, Deborah et al. *Compensation for Accident Injuries in the United States.* Rand Institute for Civil Justice @110 (1991).

A Harvard Medical Study Group estimated that eight times as many patients have suffered injury from negligent medical treatment than have filed medical malpractice claims.

The number of cases in the United States cannot be compared with the numbers filed in other countries because many other nations give injured people much greater government-provided medical treatment and disability payments following an accident than the United States does. The American system relies on a tort system that requires negligent defendants to pay for any injuries caused by their actions if a court finds them responsible.

Alternatives

Some people suggest that means of settling disputes other than using the courts should be used, and they urge parties to employ Alternate Dispute Resolution (ADR), such as

arbitration and mediation. While the use of alternative dispute resolution methods is sometimes a good idea to speed cases along, it has a number of limitations. Courts often find it a helpful adjunct to resolving some issues of domestic cases, but only the court can provide a legal document granting a divorce or ordering a spouse to pay child support. ADR is not designed to protect the constitutional rights of a defendant. Plus, arbitration and mediation add an additional layer of personnel expense that has to be provided by volunteers, the courts, or the parties involved. These costs may be manageable for the large businesses and corporations involved, but many individuals cannot afford the additional cost of an outside arbitrator or mediator. However, the biggest problem is that the constitutional guarantee of a right to trial by jury in both criminal and civil cases does not attach to ADR. The right to a jury trial is a unique and precious privilege Americans enjoy—and it can be obtained only through the courts.

Are Americans too litigious? No. We are a complex society with many disagreements and disputes.

Some critics of the court system point to frivolous or foolish cases that have been filed. Judges know how to remove those cases from the system, and they do so. A whole society should not be described as litigious because a few people take advantage of the legal system. Most Americans bring legitimate claims and concerns to the courts.

Are Americans too litigious? No. We are a complex society with many disagreements and disputes. Only a few of these disputes ever reach the courtrooms, and it is the job of judges and juries to resolve them. ♦

"Relax. Your case is as American as baseball, apple pie, and punitive damages."

From THE WALL STREET JOURNAL*—Permission, Cartoon Features Syndicate*

Taming the Beast

In City Hall, they used to call it "the beast." It slept in the attic of a huge old stone building, sprawled on dusty shelves, and was tended by a raft of clerks. The beast, as of 1992, consisted of 28,000 barely moving parts—the backlog of civil suits, 6 years old on average—waiting to be heard by the Court of Common Pleas in Philadelphia. Enter fifteen extra judges and 300 volunteer lawyers and now the case backlog has been reduced by 84 percent, to 4,500 cases. Court officials, noting that the remaining cases should be resolved by the end of the year, said, "We have tamed the beast."

Adapted from The Philadelphia Inquirer, *July 6, 1997.*

Academic Controversies *. . . continued from page 17*

with those of another, and the two seek to reach an agreement. Controversies are an inherent part of reaching a reasoned judgment, making decisions, and being a citizen in a democracy. While the controversy process occurs naturally, it may be considerably enhanced when teachers structure it in academic situations.

As Thomas Jefferson noted, "Difference of opinion leads to inquiry, and inquiry to truth." Intellectual "disputed passages" create higher achievement (characterized by critical thinking, higher-level reasoning, and metacognitive thought), more positive interpersonal relationships, and greater psychological health when they (a) occur within cooperative learning groups and (b) are carefully structured to ensure that students manage the controversies constructively. Engaging in a controversy can also be fun, enjoyable, and exciting.

It is vital for citizens to seek reasoned judgment on the complex problems facing our society. Especially important is educating individuals to solve problems for which different points of view can plausibly be developed. To do so, individuals must enter empathetically into the arguments of both sides of an issue, ensure that the strongest possible case is made for each side, and arrive at a synthesis based on rational thought. Structured academic controversies are a vital instructional tool that teaches the skills students need to be active, responsible citizens in a democracy, resolve civil justice issues without going to court, and improve their academic achievement. ♦

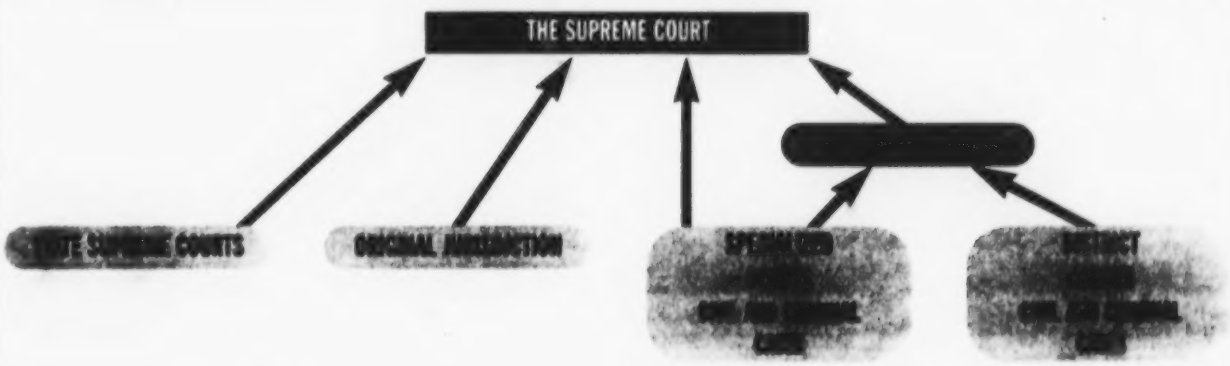
The U.S. Supreme Court: 1996

Update on Law-Related Education, 21.3, 1997, pp. 24–30. © 1997 American Bar Association.

During its 1996 term, the Supreme Court once again displayed a tendency to vote unanimously. The Court decided without dissent, or separate opinion, in 26 cases, or 32.5 percent of the cases—only slightly less than the 28 unanimous decisions (37 percent) during the 1995 term. Most of these decisions came in what might be dubbed "lawyerlike cases," those that matter in the day-to-day practice of law but have little nightly news appeal.

When the Court decides more high-profile cases, the justices are more prone to demonstrate their ideologies and file concurring or dissenting opinions. Illustrative of the tension between the Court's moderate and conservative blocs was *Agostini v. Felton*, 65 U.S.L.W 4524 (U.S. June 23, 1997). In a five-to-four decision, the Court overruled two 1985 cases and concluded that the Establishment Clause is not violated when public school teachers provide federally funded, secular education services in sectarian schools during normal school hours.

These tensions also surfaced in two civil rights cases—both decided by five-to-four votes, and both refusing to find local governments liable for serious injuries sustained by the plaintiffs in each case. In *McMillian v. Monroe County, Alabama*, 65 U.S.L.W. 4403 (U.S. June 2, 1997), trumped-up charges that led to a murder conviction in 1993, which was subsequently thrown out, were found not to be the basis for a suit against the county employing the sheriff involved. Sheriffs of Alabama are considered officers of the state, and therefore the county could not be held responsible for the sheriff's actions. (McMillian has other cases pending in the lower courts, so he may eventually be able to



The Federal Court System

The United States has state and federal court systems. As the highest court in the land, the Supreme Court reviews cases from both systems. It also has original jurisdiction in cases involving foreign diplomats or two or more states. Most federal cases are originally tried in the district courts. The district courts are grouped into 12 regions and each region has its own court of appeals. The system also includes the Federal Circuit Court of Appeals. Note that the specialized courts include such courts as the Tax Court and the Court of Claims. Some cases are appealed directly to the Supreme Court, whereas others are appealed to the national court of appeals.

recover damages for his six years of illegal incarceration.)

In *Bryan County Board of Commissioners v. Brown*, 65 U.S.L.W. 4273 (U.S. April 28, 1997), a woman passenger in a pickup truck was seriously injured when forcibly removed by a deputy sheriff after the vehicle was stopped in Oklahoma. Her suit was brought under federal civil rights law, which the Court said did not apply in this case. However, she still has the option of recovering damages in a state court.

84 Oral Arguments

In the 1996 term, the Supreme Court heard arguments in 83 cases on its appellate docket and one case on its original jurisdiction docket. The Court has original jurisdiction over a few specified types of cases, such as those involving disagreements between state governments or between the federal government and a state. In original jurisdiction cases, the Court acts as a trial court, resolving both the factual and legal issues presented. But the Court does not really hold the trial; it delegates that role to a "special master," who renders an opinion that either party may appeal to the Supreme Court.

This term's original jurisdiction case involved a dispute between the United States and Alaska over ownership of submerged land off the Alaskan coast. Some of the land is within the boundaries of the Arctic National Wildlife refuge. The ownership issue is significant because portions of the land hold oil and natural gas reserves that the owner would have the right to develop or lease, and development could raise significant environmental issues. The Court, which noted that the federal government retains rights over parcels of land that may be of use to the military—in this case, fuel for the navy—held in favor of the federal government. *United States v. Alaska*, 65 U.S.L.W. 4457 (U.S. June 19, 1997).

Of the 83 cases on the Court's appellate docket, eight fell within its mandatory jurisdiction scheme, which means that the Court was required to hear them if all other requirements were met. Five of these arose under the Voting Rights Act of 1965, and one came up under the Cable Television Consumer Protection Act of 1992. *Turner Broadcasting System v. FCC*, 65 U.S.L.W. 4209 (U.S. March 31, 1997) involved the constitutionality of the so-called must-carry provisions of the act. The Court upheld the rules that require cable networks to broadcast local programming. The seventh case was a free speech challenge to the Communications Decency Act that made it a felony to use the Internet to communicate sexually explicit material to persons under the age of 18. Free speech prevailed in *Reno v. American Civil Liberties Union*, 65 U.S.L.W 4715 (U.S. June 26, 1997).

The last mandatory appellate suit involved a separation-of-powers challenge to the line item veto that went into effect on January 1, 1997, and was filed the day after the effective date by six members of Congress. The Court did not reach a decision as to the constitutionality of the line item veto, instead ruling that the congressional challengers did not have standing to sue because they were not per-

Supreme Court Profile

The Supreme Court is the highest court in the nation, and its basic duty is to determine whether federal, state, and local governments are acting in accordance with the United States Constitution. After the Court makes a decision, all other courts in the United States are required to follow that decision in similar cases. In this way, the Court—the only court specifically created by the Constitution—helps guarantee equal justice for all Americans.

The role of the Supreme Court and its interpretation of the law change occasionally, depending upon the political, social, and economic beliefs of its members and the economic climate of the time. The President appoints Supreme Court justices, who may remain in office for life unless removed by impeachment for corruption or other abuses of office. This has never happened. When deciding a case, the justices discuss the issues in private after receiving written and oral arguments. The chief justice begins the discussion, and the other justices give their opinions in order of seniority. After the discussion, the justices vote in reverse order of seniority. Cases are decided by majority vote, but in the case of a tie—which may occur when one or more of the nine justices cannot vote because of a conflict of interest or ill health—the lower court opinion stands.

If the chief justice has voted with the majority, he selects the justice to write the Court's opinion. If the chief justice is not with the majority, the senior justice of the majority assigns the opinion. Whatever his or her view, any justice may write a concurring or dissenting opinion.

sonally injured by the act. *Raines v. Byrd,* 65 U.S.L.W. 4705 (U.S. June 26, 1997).

The remaining 75 cases on the Court's appellate docket were discretionary, which means that the Court was not required to hear them. While the Court accepts these cases for a number of reasons, the most common reason is to settle the law when different lower courts make conflicting decisions on the same issue. This term, 26 of the 75 cases on the discretionary docket were taken to resolve conflicts between federal circuit courts of appeals. That was almost 35 percent of the discretionary caseload, a decline from 45 percent in 1995 and 40 percent in 1994.

As Previously Reported

Past issues of *Update* have highlighted cases that have now been decided. These include Paula Jones's suit against President Clinton for alleged inappropriate sexual advances that she rebuffed. Clinton asserted presidential immunity and argued that at the very least the case should be postponed until the end of his term of office. The Court rejected these contentions, saying that defending this lawsuit would not hamper Clinton in the performance of his presidential duties. As an institutional matter, the Court noted that federal courts have jurisdiction over presidents and other federal officials, citing the Court's order to President Nixon to turn over audiotapes of White House meetings to a special prosecutor. Addressing the stall by Clinton on the suit, Jones noted, "He has said on numerous occasions that his lawyers could beat me in court in 20 minutes, and I'm waiting for my 20 minutes," *Clinton v. Jones,* 65 U.S.L.W. 4372 (U.S. May 27, 1997).

States may restrict the right of individuals to contract for physician-assisted suicide, according to the Court. That double-barreled ruling distinguished between the right to die and the right to have an abortion, *Vacco v. Quill/Washington v. Glucksberg,* U.S.L.W. 4695 and 4669 (U.S. June 26, 1997).

English remains Arizona's "official" language, under a ruling by the Court that essentially said that state matters should be interrupted in the first instance by state courts, not by the federal bench. *Arizonans for Official English v. Arizona,* 65 U.S.L.W. 4169 (U.S. March 3, 1997).

A death sentence given to a man who was convicted of two murders and sentenced under jury instructions that were later found to be unconstitutionally vague in another trial does not preclude his execution. The holding in the subsequent trial of another person, in this case, does not apply retroactively to the sentencing in the first. *Lambrix v. Singletary,* 65 U.S.L.W 4322 (U.S. May 12, 1997).

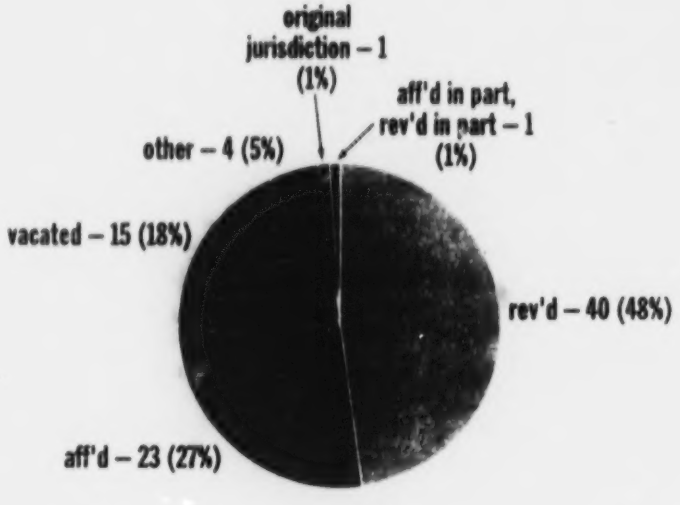
Signed Opinions by Justice

William H. Rehnquist	11
John P. Stevens	10
Sandra Day O'Connor	9
Antonin Scalia	9
Ruth Bader Ginsburg	9
Anthony M. Kennedy	8
David H. Souter	8
Clarence Thomas	8
Stephen G. Breyer	8
Total	80

Signed Opinions

Reversing a recent trend, the Court's review docket with 84 cases grew this term, compared to 77 cases heard in the 1995 term. Of the 84 cases, 80 were decided by signed opinion, one was returned to the lower courts for reconsideration in light of the recently enacted Illegal Immigration Reform and Immigrant Responsibility Act of

Total Dispositions for the 1996 Term



Adapted from Preview of United States Supreme Court Cases, *no. 8 (July 8, 1997): 72–75.*

1996, and three were dismissed, upon reconsideration, as not eligible for Supreme Court review.

As in the 1995 and 1994 terms, the task of writing the Court's signed opinions divided fairly equally among the justices. And for the third consecutive year, Chief Justice Rehnquist, who has many administrative responsibilities, was again the most active writer in the 1996 term, logging in 11 of the Court's signed opinions (10 in 1995 and 11 in 1994).

Lower Federal Courts

Of the 83 cases on the Court's appellate docket, 74 came from the federal court system—66 from the circuit courts of appeals and eight from district courts. All 14 of the federal appeals courts had cases before the Court this term.

The Ninth Circuit—which includes the West Coast, Alaska, and Hawaii—was once again the most reviewed and reversed during 1996 (now a three-term loser). This appellate division really took a pounding last term with 22 reviews (out of a total of 66; one-third of the total). The disposition of these reviews also reveals some startling statistics: that circuit was affirmed only once, while it was reversed 13 times, seven times by unanimous opinions. In four of the other cases in which the circuit was vacated, the Court's opinion actually shows that it was a reversal.

The Ninth did have some company this year, with the Second Circuit having zero affirms out of six appeals and the Seventh Circuit taking three reversals out of three appeals. Only two appeals courts had no reversals—the Tenth Circuit and the Court of Appeals for the Armed Forces although the latter had only one case before the Court.

State Courts

The Court heard only eight cases from state courts—there would have been nine, but one writ for review was dismissed as inadvertently granted—compared to 10 in 1995, 12 in 1994, and 27 in 1993. Only three state supreme courts—Idaho, Ohio, and Wisconsin—had their decisions affirmed. Five states suffered reversals—Kansas, Maine, Maryland, Mississippi, and Ohio (which went one for two). ♦

Contact Press Images/David Burnett

William H. Rehnquist

The current chief justice, William H. Rehnquist, was born October 1, 1924, in Milwaukee, Wisconsin, and attended public schools in Shorewood, a suburb of Milwaukee. He received undergraduate and graduate degrees from Stanford University and is a member of Phi Beta Kappa. He studied for a year at Harvard University and then returned to Stanford University, where he earned his law degree in 1952. He also served in the Army Air Corps from 1943 to 1946.

Chief Justice Rehnquist began his legal career as a clerk to Associate Supreme Court Justice Robert Jackson in early 1952. Between 1953 and 1969, he had a private practice concentrating on civil litigation in Phoenix, Arizona. He was appointed assistant attorney general by President Nixon in January 1969 and sworn in as an associate justice of the Supreme Court in January 1972. President Reagan nominated Rehnquist for the chief justice position in 1986, and he was sworn in for that post on September 26, 1986.

Case Study: Civil Rights

Richardson v. McKnight

65 U.S.L.W. 4579 (U.S. June 23, 1997)

Petitioners: Daryll Richardson and John Walker
Respondent: Ronnie Lee McKnight

Adapted from Preview of United States Supreme Court Cases, *no. 8 (July 8, 1997): 59.*

One of the major pieces of Reconstruction-era legislation passed by Congress was the Civil Rights (Ku Klux Klan) Act of 1871. The act was primarily designed to give newly freed slaves a means of protecting themselves from the loss of rights guaranteed by federal law. But the statute's terms did not limit it to that specific part of the population, and a Supreme Court decision in 1961 (*Monroe v. Pape*, 365 U.S. 167) expanded the law to become an all-purpose vehicle for redressing civil rights violations.

There is, at times, a qualified immunity defense in civil suits against government officials and employees. State employees may claim the qualified immunity defense to avoid a trial if they can show that they could not have known they were violating the law. This immunity is "qualified" in that the employee must not have violated clearly established federal rights, either constitutional or statutory, which a reasonable person in the defendant's position would known.

Given the recent barrage of downsizing and outsourcing, the question has become Is this defense available to employees of private firms that have state contracts to perform state duties.

FACTS

Tennessee has agreements with private companies to manage and operate prisons within the state. These companies provide corrections officers. An inmate Ronnie Lee McKnight filed suit under the Civil Rights Act alleging that corrections officers Daryll Richardson and John Walker violated his Eighth Amendment right to be free from cruel and unusual punishment. Specifically, he claimed that the restraints he had to wear during transport were unduly tight, causing serious injury that required hospitalization. He also claimed that instead of heeding his protests about the restraints, the officers taunted him.

Claiming qualified immunity as corrections officers, Richardson and Walker moved to dismiss the complaint. A federal district court refused, and the Sixth Circuit Court of Appeals affirmed that decision. The Supreme Court, apparently noting differences of opinion in the lower courts about how to handle private contractors on the state payroll, agreed to hear the case.

The primary purpose of the qualified immunity defense is to ensure that government officials and employees are not dissuaded from performing their responsibilities for fear of being sued. Private parties acting as government functionaries may or may not be acting in the public interest. The Sixth Circuit noted that private corrections officers certainly serve the public interest, but public service is not their principal motivation. Profit and job security are the principal motivations.

Richardson and Walker argued that the Court should focus on their duties as corrections officers rather than on their employment by a private company. Specifically, they contended that operating a prison system is a fundamental government function. They argued that on that basis, extending qualified immunity to privately employed corrections officers would serve the same public good as providing it for public employees. In their view, the threat of being sued is just as likely to deter qualified people from becoming corrections officers employed by the private sector as to deter those employed by a state.

This case is used in the Teaching Strategy on page 41.

McKnight, for his part, said that the entire purpose of the qualified immunity defense is to ensure that public employees act vigorously in the public interest even at the risk of being sued. Private employees have no such motivation, he argued, and are only in the business for the money. Private firms are also able to insure their employees against civil suit awards and can write off the litigation expenses as a cost of doing business. McKnight further contended that public employees are accountable to the public and may be removed from their jobs in a variety of ways that do not apply to employees of private firms.

DECISION

The Supreme Court, by a five-to-four vote, affirmed the Sixth Circuit's ruling that employees of for-profit corporations may not assert qualified immunity. The majority pointed out that privatization of corrections facilities is not new. It dates back to the 18th century in both England and the United States, and common law in both countries did not grant immunity from suit to the employees of such enterprises. The Court also noted that the firms have a profit motive and that they insure their employees against prisoners' lawsuits, which negates the need for an extension of the limited immunity defense.

Case Study: Class Action Suits

Amchem Products v. Windsor

65 U.S.L.W. 4635 (U.S. June 25, 1997)

Petitioners: Amchem Products, Inc.
Respondent: George Windsor

Adapted from Preview of United States Supreme Court Cases, *no. 8 (July 8, 1997)*: 65–66.

This case arose as a result of a so-called global settlement of the personal injury claims of two exceedingly large classes of claimants: (1) persons with asbestos-related disease and their family members and (2) persons exposed to asbestos but not yet ill and their family members. The settlement was the result of extensive negotiations between attorneys representing thousands of plaintiffs in asbestos cases and attorneys representing some 20 former asbestos manufacturers.

FACTS

The settlement at issue would cap the number of claimants, establish a maximum dollar amount of liability, and substantially reduce the cost of litigation. It would also provide a three-month opt-out period during which potential class members could either join the class or forgo class membership to pursue their own litigation.

A federal district court in Pennsylvania certified the class over the objections of some of the potential class members. On appeal, the Third Circuit set aside the certification order, holding that the global class was composed of too many disparate subclasses to satisfy class requirements. In particular, the appeals court noted that interests of the two principal subclasses—those already ill and those only exposed—were at odds with one another. The already ill were focused on obtaining the largest compensation award as soon as possible, while the only exposed were lobbying to preserve the payout fund for future claims.

These conflicting interests also meant that the claimants named as class representatives could not provide adequate representation for the two principal subclasses. Actions and decisions that would benefit the already ill would be detrimental to the only exposed and vice versa.

DECISION

The Supreme Court affirmed the Third Circuit Court for essentially the same reasons given by the appeals court. In so holding, the Court did not repudiate the device of settling a class action case prior to judicial certification of the case as a class action. But the decision does amount to a caution to attorneys to scrutinize the issues involved to ensure that common issues predominate over individual ones so that all members of the class as certified will receive adequate representation.

More on Asbestos . . .

In a related case dealing with asbestos, Michael Buckley claimed that he had been exposed to asbestos for three years, from 1985 to 1988, as a consequence of his employer's negligence. Buckley no longer works around the material, but since attending an asbestos-awareness class, he now fears that he will develop an asbestos-related disease such as cancer. Buckley, as a railroad employee, is entitled by law to damages for injuries caused by the negligence of his employer.

Proceeding under the appropriate statute, Buckley sued in a federal district court, seeking damages for emotional distress related to his fear of contracting an asbestos-related disease. He also sought to recover the actual costs of medical monitoring. The district court ruled against him, but an appeals court reversed. The appeals court held that Buckley's extensive exposure to asbestos was a physical impact and that such exposure would cause emotional distress—fear of developing a potentially fatal disease—in a reasonable person.

The Supreme Court disagreed and reversed. The Court concluded that an employee cannot recover damages for emotional distress related solely to the anticipation of a disease. In the Court's view, recovery for emotional distress requires either an actual physical impact caused by an employer's negligence or a threat of immediate harm or injury flowing from negligence. Distress related to an employee's physical contact with, proximity to, or exposure to a harmful substance is not enough. The Court grounded its holding on the difficulties of distinguishing genuine from trivial only-exposed emotional distress claims.

Also rejected was Buckley's recovery of costs for medical monitoring because they were directly related to the distress issue. Allowing the large numbers of persons who have been exposed to asbestos to recover the costs of monitoring from their employers would drain resources away from the compensation of persons who have actually been injured, the Court said, adding that federal law requires some employers such as railroads to provide medical monitoring for employees exposed to asbestos. *Metro-North Commuter Railroad Company v. Buckley*, 65 U.S.L.W. 4586 (U.S. June 23, 1997).

Adapted from Preview of United States Supreme Court Cases, *no. 8 (July 8, 1997)*: 59–60.

Check Out the Supreme Court!

Directions: Circle T for true or F for false. You'll find the answers on page 50.

1. The Supreme Court is the only court specifically created by the U.S. Constitution.
   T F
2. Congress sets the number of Supreme Court justices, and this number may vary.
   T F
3. The Constitution sets no qualifications whatever for Supreme Court justices; it does establish their appointment process.
   T F
4. Supreme Court justices vote in order of seniority. T F
5. In case of a tie vote on a case appealed to the Supreme Court, the lower court decision is left standing, and the parties have no further appeal. T F

BONUS: Circle the last names of our Supreme Court justices. (Hint: There are 9.)

Stevens	Richardson	Gingrich	Scalia
Kaplan	Thomas	Kennedy	Ryan
Knox	O'Connor	Nessel	Christopher
Souter	Breyer	McKinney	Blaine
Ginsburg	Gore	Rehnquist	Nash

HAVING A PROBLEM WITH YOUR SUBSCRIPTION?

Send us your label and check the appropriate boxes below to make adjustments to your subscription.

☐ Receiving duplicate copies.
(Please send both labels.)

Attach label here...

☐ Change of address.
(Please send old label and new address.)

☐ Receiving invoice, already paid.
(Please send us a copy of the invoice and proof of payment.)

☐ Other: _____

☐ **Start subscription.** ($30 one year/3 mailings.)
Payment enclosed.

Or charge my: ___ Visa ___ MasterCard _____ Account No.

_____ Exp. Date

_____
Name

_____
Title

_____
Address

_____
City, State, Zip

Mail to:
UPDATE
Circulation Manager
American Bar Association
PED/15.3
541 N. Fairbanks Court
15th Floor
Chicago, IL 60611-3314

Attach your present mailing label here.

Update on Congress

A Review of Current Issues Facing Congress

Update on Law-Related Education, 21.3, 1997, pp. 31–32. © 1997 American Bar Association.

More Discipline for Disabled Students?

There appears to be a growing number of students who are, by law, protected from disciplinary action by schools because they are disabled. In one instance, a 17-year-old junior terrorized his school by throwing punches, brawling, and breaking the nose of a teacher's aide. Because the student was diagnosed as emotionally disturbed, he could not be suspended, expelled, or sent to a special school. Instead, the principal, at a cost of $40,000, had to hire a full-time teacher and an aide just for the student, who spent the year in a classroom separated from the rest of the school.

When the Individuals with Disabilities Education Act (IDEA) was approved in 1975, it sounded like an idea whose time had come. The law guarantees an education to all disabled children under the age of 21 and requires that they attend school in the "least restrictive setting," usually a regular classroom. But with violence in schools on the rise and the growing number of those classified as disabled (from 4.4 million in 1988 to 5.5 million in 1995), teachers want the law changed.

The House has passed a measure that would tighten the discipline guidelines, but educators say that the changes do not go far enough. According to teachers and principals, the House bill would set up such complicated rules that punishment of disabled youngsters who use their fists to attack teachers or others would still be unlikely. Teeth and hands can be as dangerous as knives or guns, one principal said, citing a case in which a teacher bitten by a special education student had to have hepatitis shots.

Adapted from The Wall Street Journal, *May 14, 1997, page A24.*

Internet Ruling Could Spark New Legislation

The Supreme Court struck down the law that would have banned the dissemination of indecent materials to minors on the Internet, but more legislation could be forthcoming. The Court ruled the Communications Decency Act unconstitutional as an abridgment of free speech rights. Supporters of the law would like Congress to reverse that ruling.

In the past, opponents of the law advocated legislation creating a technological standard for software that would allow parents to block objectionable E-mail and Web sites. But the ongoing debate over the v-chip and television ratings has led some people to wonder whether Congress might seize on such technological fixes to impose a rating system on cyberspace. In any event, most players agree that there will be new legislation and a lively debate now that the Supreme Court has ruled on the issue.

Adapted from Congressional Quarterly, *March 11, 1997 (AOL).*

Dollars and Cents

President Clinton has approved a tax-cut measure passed by Congress. For parents of children under 16, this means a $400 per-child credit in 1998 and a $500 per-child credit in 1999. Couples making $110,000 or more may not take the full deduction, and single parents making more than $95,000 are subject to phase-out rules.

Tax credits are available for college expenses. For their child's first two years of college, parents can receive a 100 percent credit for the first $1,000 of expenses per year and a 50 percent credit for the next $1,000 for payments made after 1997. For the student's third and fourth years of college, the tax credit is 20 percent of costs up to $5,000 (beginning on July 1, 1998). The credit program has a phase-out provision that begins at an income of

Information in this article is used in the Teaching Strategy on page 55.

Did you know?

Statistically, only about 3 percent of the bills introduced during any given session of Congress—a two-year period—become law. Even appropriation bills, which are essential to the running of the government, are sometimes not enacted. They then must be supplanted by what is called a "continuing resolution," which allows federal agencies to operate at the funding level of the previous year or the House-passed version, whichever is higher.

$80,000 for couples and $50,000 for singles.

Student loan interest of $1,000 in 1998, $1,500 in 1999, $2,000 in 2000, and $2,500 in 2001 and thereafter may also be deducted. The phase-out for this program begins at $60,000 for couples and $40,000 for singles. It is only available for taxpayers who do not itemize their deductions.

The last of the education-related provisions in the tax bill is that parents may save (after paying taxes) $500 per year per child in education accounts for their children under the age of 18. The phase-out here begins at $150,000 for couples and $95,000 for singles.

Adapted from The Wall Street Journal, *August 1, 1997, p. A2.*

School Prayer Amendment Introduced

Religious conservatives in the House of Representatives have introduced a religious freedom amendment to the Constitution that would allow prayer in public schools. The amendment, backed by 117 representatives, reads: "To secure the people's right to acknowledge God according to the dictates of conscience: The people's right to pray and to recognize their religious beliefs, heritage, or traditions on public property, including schools, shall not be infringed. The government shall not require any person to join in prayer or other religious activity, initiate or designate school prayers, discriminate against religion, or deny equal access to a benefit on account of religion."

The House leadership has promised a vote on the proposed amendment this fall. To be approved, amendments to the Constitution require a two-thirds vote by both the House and the Senate and backing by three-fourths of the states.

Adapted from The New York Times, *May 9, 1997.*

Mediation Is Cheaper?

Conventional wisdom has held that mediation is cheaper and faster than litigation. But that, along with other so-called truisms about litigation, has been debunked by a study assessing the effectiveness of reforms mandated by the 1990 Civil Justice Reform Act. The study recently concluded that many of the reforms in the civil justice system have done little to reduce the cost of case disposition or the delay in making decisions. Mediation and mandatory arbitration, for example, have yielded no significant decrease in litigation costs, resolution time, or attorney satisfaction.

A few reforms did show promise, though. Perhaps the most encouraging finding was that a combination of techniques could reduce the time to case disposition by as much as 30 percent. The combination included setting trial dates early, having litigants at settlement conferences available by phone, reducing discovery time, and having judges manage cases soon after filing.

Armed with the study—which was undertaken by the Rand Institute for Civil Justice in Santa Monica, California—Congress must now decide which of the reforms to effect on a nationwide basis or whether to allow continued experimentation. The statute calls on the U.S. Judicial Conference to make recommendations on this issue, but the question is whether the Republican-led Congress will defer to the judiciary's ideas or take the matter into its own hands.

The choices are not easy. One of the biggest surprises of the study was that techniques that speed resolution of cases do not necessarily lower litigation costs.

"If the parties want to reduce litigation expenses, they will have to shoulder the burden themselves. They can't look to judges for them," the lead researcher on the study said. "Judicial case management explains only about 5 percent of the variation in litigation costs."

Adapted from ABA Journal, *April 1997, pp. 14–16.*

Technique	Time in Disposition	Costs (in lawyer hours)
Early judicial management (of any kind)	Decreased	Increased
Setting the trial schedule early	Decreased	No effect
Reducing the time for discovery	Decreased	Decreased
Having the litigants available for settlement conferences	Decreased	No effect
Mandatory early disclosure	No effect	No effect
Joint discovery/case management plan	No effect	No effect
Referral to mandatory arbitration	No effect	No effect

E Project Exchange

Ideas From Project P.A.T.C.H.

Paula A. Nessel

Update on Law-Related Education, 21.3, 1997, pp. 33–34. © 1997 American Bar Association.

Small groups of teen-agers stand waiting in a short stretch of hallway in a Northport, New York, high school. Behind a nearby door, adults and other students pack a classroom designed to look like a courtroom. There a panel of nine adults, some wearing judicial robes, sit behind an extended bench, listening as two teams of teen-agers plead their cases. Those in the hallway are waiting for their 16-minute appearances before the judicial panel. The atmosphere is both intense and celebratory for this is the Law Day civil law moot court competition sponsored by Project P.A.T.C.H. (Participatory Awareness Through Community Help) and the New York State Bar Association's Law, Youth and Citizenship (LYC) program.

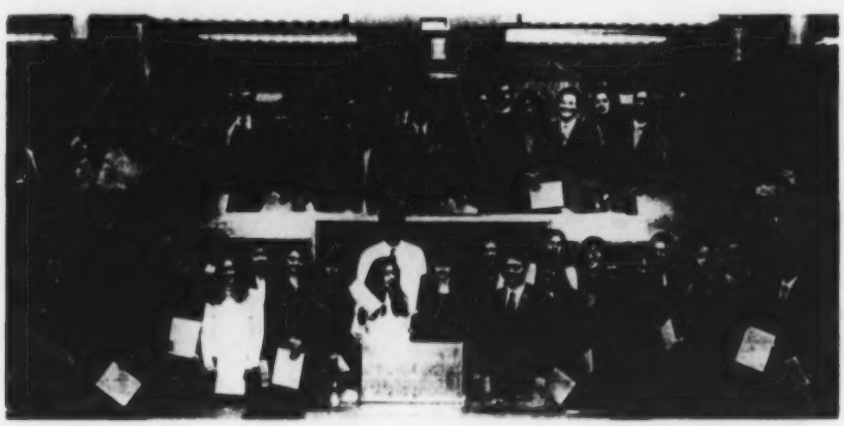
The competition is the culminating event of a civil law unit developed by P.A.T.C.H. and LYC over 20 years ago. *Civil Law Mini-Trials* (also know as "One on Ones" and "Freedom") provides an overview of civil law, highlighting topics such as breach of contract, negligence, and defamation of character, and offers active, effective techniques for sparking students' interest, participation, and achievement.

A major component of *Civil Law Mini-Trials* is 50 civil law case/fact cards and case verdicts, based on real cases. (See box on page 34.) The program procedures allow a teacher to hold an entire trial during a single class period, from the random choosing of the attorney and witness for each side, through the trial, to a debriefing of the case. Students not chosen as attorneys or witnesses participate by using assessment forms to score the performances.

Beyond classroom use, the civil "One on One" can be used for in-school or multischool competitions. The P.A.T.C.H. Law Day competition draws over 32 participating teams each year from schools across Long Island.

In the competition, each team receives its case/fact card 10 minutes before members argue their case. Members use the 10-minute period to decide who will serve as attorney and witness and to determine what strategies they can use in their presentation. Thorough knowledge of the civil law unit is essential, but ability to "think on one's feet" is also vital. Because teams are not given any rehearsal time, the activity provides an excellent opportunity for authentic assessment.

For those who prefer another approach to the civil law unit, a "Face the Facts" game, appropriate for grades 4–12, is also described in *Civil Law Mini-Trials*. In the game, a case/fact card is read to the class twice. Each student holds up a DEFENDANT or PLAINTIFF card to indicate who he or she feels should win the case. The teacher reads the verdict, and the class discusses the issues of the case. The game can be used periodically during the civil law unit or as a culminating activity.



158

Sample Case/Fact Card

Plaintiff, Ms. Nelson, is suing the defendant, Mr. High, for damages resulting from the defendant's negligence.

PLAINTIFF: Ms. Nelson – "I was eating lunch in Mr. High's restaurant. For dessert, I had a piece of blueberry pie. I took a bite of the pie and when I swallowed, I felt a sharp pain in my throat. To make a long story short, I had swallowed a tack, which necessitated an operation for removal. I claim that my injury resulted from Mr. High's negligence in allowing the tack to be baked in the pie, which, incidentally, was baked in his very own kitchen."

DEFENDANT: Mr. High – "I admit that the type of tack that Ms. Nelson swallowed is just like the ones used in making the boxes the blueberries come in. I've been in business for 18 years, and this is the first time I have ever seen a tack in the blueberries. I use every care possible in the preparation of the food in my kitchen. I couldn't say how the tack got into the blueberries, nor do I see how anyone else can. Therefore, I don't see how I can be held responsible."

Project P.A.T.C.H. uses many interesting approaches to teaching law and citizenship in K–12 classrooms, including voter education (even the youngest students register to vote and cast ballots in mock elections), jury duty (for mock trials), and peer mediation.

At the high school level, international law classes have been enriched by telecommunications contacts with schools in Canada, Israel, Russia, and Belgium since the 1980s. The LYC program of the state bar and the New York State Education Department provided strong support for P.A.T.C.H.'s partnership with schools in Antwerp, Belgium, and Moscow, Russia, in drafting a treaty to end deforestation around the world. Students from the three schools presented the treaty, accompanied by supporting petitions with 13,000 signatures, to the International Court of Justice in The Hague, Netherlands, in 1989.

Formal law studies began in the Northport-East Northport Schools in 1969 when social studies teacher Tom O'Donnell offered a 10-week survey of the American legal system as part of a high school elective. The acronym P.A.T.C.H. was selected by students in 1975 as a name for the law studies program. Today, LRE is part of the curriculum in grades K–12 throughout the district.

Teachers are encouraged to tap the resources P.A.T.C.H. and LYC have developed. They offer a number of free publications and an outstanding, FREE, first-come, first-served, five-day Comprehensive Law Studies Summer Institute. For more information, contact Tom O'Donnell at 516/262-6874 (e-mail: patch@li.net; web site: www.northport.k12.newyork.us) or LYC at 518/474-1460 (e-mail: lyc @nysba. org; web site: www.nysba.org). The P.A.T.C.H. program is also part of the Touro Law School web site at www.tourolaw.edu\patch. ♦

To Follow the Supreme Court

Your need for comprehensive, accurate, unbiased, timely information about the Supreme Court is met in *PREVIEW of United States Supreme Court Cases*. This award-winning journal from the American Bar Association covers the Court from oral arguments to decisions. *Preview* covers freedom of speech, voting, environmental and consumer law, equal protection—and so much more!

Special summer issue digests all decisions for the term. Eight issues, September to July. ABA member price, $95; nonmember, $105; organizations, $130. Decisions issue available separately for $45.

To receive a free sample issue, call (312) 988-5729, FAX (312) 988-5494, or write PREVIEW Circulation Manager Jane Moisant at *PREVIEW of United States Supreme Court Cases* at the address shown.

DIVISION FOR PUBLIC EDUCATION
AMERICAN BAR ASSOCIATION

Student-Lawyer Exchange

A conversation starter between lawyers and students on civil justice

Dianne K. Dailey and Linda M. Bolduan

Update on Law-Related Education, 21.3, 1997, p. 35. © 1997 American Bar Association.

Following are some hypothetical situations involving civil law that your students can use as conversation starters with lawyers, judges, and other resource persons from your local legal community. Ask students to volunteer to make such contacts. Optional ways to handle their assignments are to interview the resource persons and report back to the class. Since the subject matter involved can be complex, students should prepare some background material to pass out for the chosen option as well as presentation devices such as flowcharts to enhance the presentation.

Constitutional Rights of Students

Questions relating to practice of religion in the schools

1. You are graduating from the eighth grade. It is a very important moment in your life. Can a priest, minister, or rabbi lead a prayer at the graduation ceremonies?
2. It's Christmas. Your school wants to put on a play about the three wise men. Can it do so?
3. You belong to a religious club. Your school won't let you meet in the cafeteria after school even though the school allows the Chess Club to meet there. Can your school prevent your club from meeting in the cafeteria?

Questions relating to publishing a school newspaper

4. You are editor of the school newspaper. One of your friends wants you to publish an article about racial problems in the school. Can you publish the article?
5. As editor of the school newspaper, can you publish an article that uses derogatory terms about a particular group of students?

Questions relating to drug testing

6. You are on the basketball team. To prevent drug use, the school engages in random drug testing. You have never and will never use any kind of illegal drugs. Can you refuse to take the drug test by claiming that it violates your constitutional right to privacy?

Tort Law

Questions relating to actions by other students

7. Suppose you get assaulted on the school grounds. Can you sue the student who assaulted you?
8. Your math teacher just piles on the homework. You are a good student, but you just can't handle the load anymore. You feel that the teacher "has it in for you." Can you sue her for your emotional distress?

Family Law

Questions relating to divorce

9. Your parents are divorced. Your brother is living with your father. You live with your mother, but you want to be with your brother at your father's home. Can you get someone other than your mother's or father's attorney to represent you? How do you go about getting an attorney? Will the judge help you?

Teaching Strategy

Teaching About Tort Law— My Actions, My Actions, Somebody Got Hurt!

Stephen A. Rose

Update on Law-Related Education, 21.3, 1997, pp. 36–40. © 1997 American Bar Association.

Background

In "Understanding the Civil Justice System," Robert E. Hirshon and Linda M. Bolduan offer an overview of the civil justice system. They describe civil law, how it is made by judges and statutes, the means by which wrongs are redressed, and how civil law affects our lives. This strategy offers students a brief overview of civil law and focuses on tort law. Students will use cases to learn about three types of torts—intentional wrongs, negligence, and strict liability. They will use the reasonable person and reasonable care standards to establish negligence and liability. The lesson will conclude with students considering to what extent parents should be held responsible (liable) for their child's actions that result in injuries to others.

Objectives

As a result of this lesson, students will

- Define civil law and give examples of the main areas of the law
- Explain the structure of state and federal courts in the civil justice system
- Explain three categories of tort law
- Use the reasonable person and reasonable care standards to determine negligence and liability in sample cases
- Develop initial arguments for and against parents being liable for damages caused by their children's actions in school

Stephen A. Rose is a professor of education at the University of Wisconsin, Oshkosh.

Target Group: Secondary
Time Needed: 2–3 classes
Materials Needed: article "Understanding the Civil Justice System," Student Handouts 1–3
Resource Person: Lawyer

Procedures

1. Use the hypothetical case about the basketball star who tripped over a dog that Hirshon and Bolduan provide as an example of a tort law case (see page 9). Have students read the text and then pair up to develop reasons why the plaintiff wants to sue and the counterarguments the neighbor might make. Have the pairs share their lists with the class. Tell students that this case is one of many types of conflicts the civil justice system addresses.
2. Have students read the article on pages 6–9. Use the following questions to guide student reading: What are the differences between criminal and civil laws? How are federal and state courts organized? What are some types of cases heard by a civil court? Why should parties to a civil suit try to resolve the conflict before going to court? What is the purpose of the statutes of limitation? How does civil law affect your life?
3. Ask students to identify types of civil cases they have read or heard about in the media. If students have not read about civil cases, ask them to collect cases that appear in newspapers or other media. Medical malpractice, automobile accidents, product liability, disputes over contracts, bankruptcy actions, environmental cases, etc., provide useful information about how the civil justice system works.
4. Tell students that one branch of civil law is tort law. Explain that this type of law deals with cases involving the rights and obligations of persons whose actions have resulted in an unintentional or intentional wrong or injury. The action may cause bodily harm; damage property, business, or reputation; or make unauthorized use of someone's property. The victim may sue the person or persons responsible for damages.
5. Distribute Handout 1, which explains three major classifications of torts and cites three case studies. Review the types of torts. Have pairs of students read the

See articles on pages 6 and 13 for background information.

Baseball Stories

Amateur athletes in tiny Webster, Florida, are finally playing baseball with impunity. The game was deemed illegal in 1902 and, until the city council repealed a long-forgotten ban, the national pastime is now being conducted without threat of fines and jail sentences after 85 years.

Take me out to the ball park, but watch out where you sit and who is playing. There are perils that you might not know about. Not only is being hit by a foul ball a risk fans assume at games, so too is being clobbered by a carelessly flung mask, helmet, or bat weight, according to an Indiana appeals court.

Complaints about the now-Tampa Bay team name—Devil Rays—are just part of the game's running contest with Satan. Religious forces during the late 1880s and early 1990s convinced Arkansas legislators for 44 years that Sunday games were the work of the devil. (This was one of the "Blue Laws" that prevented certain activities on the Sabbath.) On April 7, 1929, however, following the repeal of the prohibitive statue, the Arkansas Travelers beat Shreveport 9–3 in the state's first legal Sunday game of this century.

Before the free-agent rule was adopted and players were bound to their teams more or less for life, trading the players was tough, but their pictures were also regulated. If you wanted a picture of Willie Mays, Babe Ruth, or Roger Maris, you bought chewing gum. As it turns out, professional team owners are not the only members of the baseball community to be familiar with antitrust laws. Fleer Corp., a Philadelphia-based gum maker, needed a U.S. district court order in 1980 to enter the trading card market, which had been monopolized by Topps Chewing Gum of Brooklyn under an agreement with the Major League Players Association.

Adapted from ABA Journal, *August 1997, p. 16.*

case studies and classify each case according to the type of tort it represents. Case 1 is a strict liability tort, Case 2 is a negligence tort, and Case 3 is an intentional tort.

6. Introduce the reasonable person and reasonable care standards by distributing Handout 2. Have students read and discuss why these concepts are useful in law. Then refer them to the case about the basketball star cited in the article they read earlier (see page 9). Ask students what factors would have to be proven in order for the plaintiff to receive a court-ordered payment for damages. Then proceed to explain each element of the reasonable care standard. Make sure students understand that to win a negligence case a plaintiff must prove all four elements in the reasonable care standard. If not, the plaintiff's case will not prevail.
7. Invite an attorney who has tort law experience to serve as a resource person in your class. Tell the attorney that students will have applied the reasonable person and reasonable care standards to sample cases in order to develop a tentative decision about whether the defendants in each case have been negligent and are liable for damages. Explain that the attorney's role is to listen to students explain their reasons for their decisions, to react to student remedies, and to offer other relevant factors students need to consider in each case. Explain that Case 2 closely parallels a Wisconsin Supreme Court Case *Nieuwendorp v. American Family Insurance*, 191 Wis.2d 462, 472,529 N.W. 2d594 (1995). Ask the attorney to locate the case and be prepared to answer student questions about the Wisconsin Supreme Court's ruling.

   Before the attorney arrives, divide the class into groups of three and distribute Handout 3. Ask the groups to apply the reasonable person and reasonable-care standards to each case. Groups should decide whether negligence and liability can be established with the existing information. Ask them to keep a written record of their deliberations and be prepared to present these to the attorney. Students should develop a list of questions they have about the specific cases and about negligence and liability in general.
8. Conclude the lesson by asking the class to determine to what extent parents should be held legally liable for their children's actions that cause harm or injury to others. Case 2 on Handout 3 is a natural link to this question. The attorney's reaction to students' reasoning and the information he or she brings to class about this case are likely to generate a conversation about the issues of personal action and negligence in school and the potential burdens placed on parents.

Student Handout 1

Torts—Types and Cases

Types of Torts

In tort cases, **strict liability** makes a person or organization liable regardless of fault. Courts hold persons or companies strictly liable when they are engaged in inherently dangerous activities. In dangerous activities, innocent people may be harmed even when great (expert) care is exercised. Transporting or storing toxic substances, keeping dangerous animals, and blasting are examples of business activities in which businesses are held strictly liable.

Negligence is the failure of persons or organizations to exercise the standards of care that society expects of reasonable people. For example, a driver has a reasonable duty to use care to avoid injuring other drivers or people on the road. If a driver fails to carry out this standard of care and injures someone, then he or she is responsible (liable) for the injuries that result from that negligence.

Intentional torts occur when a person's or organization's actions deliberately cause harm. Examples of intentional torts are one person hitting another person in a fight, a store owner falsely accusing and detaining a person for shoplifting, and one person purposely slandering or libeling another person, thus defaming his or her character.

Tort Cases

Case 1

Sara Jones is a 30-year-old dentist who opened a bottle of soda produced by the Best Beverage Company. The bottle exploded. Flying glass cut her face, including her eyes. Doctors removed the glass from her eyes, but Sara was left with only limited vision. Because she can no longer perform her job as a dentist, Sara sues the Best Beverage Company for her medical bills and future loss of income over the next 35 years.

Case 2

Jeff, Bette, and Tenika are 17-year-old students who attended a high school graduation party hosted by Jason Jones's parents. The Joneses allowed Jeff, Bette, Tenika, and the other high school students at the party to drink beer and wine.

When Jeff was driving Bette and Tenika home, he ran a stoplight, and his car collided with a car driven by Mr. Bearing. The entire Bearing family was injured in the crash, and the youngest child was very seriously injured. The Bearings sued Jeff, his parents, and Mr. and Mrs. Jones. The Bearings want all of their medical and rehabilitation bills paid for and seek additional damages for Jeff's reckless drunk driving.

Case 3

The Averys are well-known and respected members of their community whose daughter, Cynthia, had been an honors student. Today, Cynthia is enrolled in a drug rehabilitation program, which she voluntarily entered. Cynthia began using cocaine after she started dating Doug. The Averys learned that Doug had been arrested twice for drug use. They blamed him for contributing to Cynthia's drug use, thereby ruining her life. Outraged, they publicly spoke and wrote about Doug's past record of drug use and his drug-induced lifestyle. Doug brought suit in court claiming that the Averys' public and written remarks were not accurate. He also claimed that as a result of the Averys' standing in the community, their comments have made it impossible for him to find employment. Doug seeks monetary damages.

Student Handout 2

Reasonable Person and Reasonable Care Standards

Reasonable Person Standard

No set of laws regulating liability for personal or property injury can possibly foresee the countless ways human beings and their property can harm other people or property. Since the law can't provide for every possibility, it has evolved the standard of the reasonable person to furnish some uniform standards and to guide the courts. Through the fiction of the reasonable person, the law creates a standard that the judge or jury may apply to each set of circumstances. It is a standard that reflects community values rather than the judgment of the people involved in the actual case. Thus, in addition to examining evidence, a fact finder, usually a jury, might decide an automobile accident case by asking what a reasonable person might have done in a particular traffic or hazardous situation.

Reasonable Care Standard

To determine whether a defendant is negligent, usually a court decides

- Whether there is a legal duty to perform
  (Neighbors have a duty to keep their dog in their own yard.)

Then the jury most often decides

- Whether the duty has been breached
  (The neighbors' dog was at your front door.)
- Whether the failure to perform the duty caused the damages
  (You tripped over the dog that was at your door.)
- Whether the damages are provable.

Student Handout 3

Negligence Cases

Case 1

The Slegesky family lives in a residential neighborhood that has many families with children of many different ages. The Slegesky children have been pressuring their parents to buy a trampoline. The parents finally gave in and, against their better judgment, bought a trampoline. They set it up in their backyard. In plain view, they posted rules for using the trampoline. The rules are (1) only two people on the trampoline at any one time; (2) only normal jumping allowed; (3) absolutely no front, back, or side flips; and (4) a child must have his or her parents' or guardian's permission to jump on the trampoline. The Slegeskys insist that before any child other than their own children can jump on the trampoline, he or she must have a waiver of liability form signed by his or her parents or guardian. The form reminds parents of the possibility of serious injuries that could be sustained by a child jumping on the trampoline and waives the Slegeskys' liability for potential injuries.

Anna Jones, age 14, is a neighbor whose parents signed the waiver form. When jumping on the trampoline a month ago, Anna tried a flip. She missed the trampoline's mat and hit the ground, breaking both arms and injuring her back. Her parents (plaintiff) bring suit in court claiming the trampoline is unsafe and want the Slegeskys (defendant) to pay all medical bills and associated expenses and to pay for the emotional distress the injury caused them.

Case 2

Dave and Jan Rosen's son, Kenny, has been diagnosed with a hyperactivity disorder by doctors at a well-known medical clinic. The problematic social and learning behaviors associated with the disorder can be substantially lessened by daily medication. School officials and Kenny's parents notice that when Kenny uses the medication, he is more likely to pay attention in school, less likely to use vulgar language, and less physically aggressive toward other children and adults. The Rosens keep Kenny on the medication the last half of one school year and the first half of the next school year. Then the Rosens stop Kenny's medication without telling school officials or consulting with Kenny's doctors about alternative forms of treatment for his disorder.

With no medication or other form of treatment, Kenny's problematic behaviors blossom. He is disruptive in class and develops a regular pattern of having to be placed in the "time-out room." On several occasions, he has been sent to the principal's office. On one occasion, Kenny was asked to go to the time-out room, and he refused. Two teachers physically escorted him to the room, but along the way Kenny kicked and fought with them. He grabbed Ms. Smith's hair with such force that she fell to the floor and injured her neck. Ms. Smith had surgery for a herniated disc in her neck. Ms. Smith (plaintiff) sues the Rosens (defendant) for the harm caused by Kenny. She wants her medical bills paid and other damages awarded for pain and suffering.

Should a court award the damages requested in each case?
Did the plaintiffs contribute to the negligence in either case?

Teaching Strategy

Teaching Civil Justice Through Academic Controversy

David W. Johnson and Roger T. Johnson

Update on Law-Related Education, 21.3, 1997, pp. 41–43. © 1997 American Bar Association.

Objectives

As a result of this lesson, students will

- participate in the academic controversy process
- identify a controversial issue
- weigh the pros and cons of each position taken in a controversy
- synthesize information to make a decision

Target Group: Secondary
Time Needed: 2–3 classes
Materials Needed: Student Handout
Resource Person: Lawyer

Procedures

1. The recommended scenario for this activity is the civil rights case *Richardson v. McKnight*. (See page 28.) However, you may use the strategy with any situation described in this magazine. See, for example, "Student-Lawyer Exchange," on page 35. Ask two or three students to prepare a simple summary of the Richardson case if you plan to use it. Provide these students with copies of the introduction and the Facts section in the Richardson article. Do not share the Decision portion of the article. After students have completed their written summary, photocopy and distribute the summary to the class. You may also wish to invite a lawyer or other legal expert to present information to the class about the case. If you choose to use another case situation, provide students with information about the case.
2. Divide the class into groups of four students and pair students within each group. Distribute the Student Handout. After students have read the task statement, ask one pair to prepare position statements for assigning responsibility to one party and the other pair to prepare position statements for assigning responsibility to the other party.
3. Ask students to develop the best case possible for the assigned position and to plan their position statements so that the other pair in the group will give it a fair and complete hearing. Recommend that students research information to support their position as much as possible. They might discuss the case and their arguments with the resource person, find information about civil rights cases on the Internet, or find information in encyclopedias and other reference books. Also encourage pairs to compare notes with pairs from other groups who represent the same position.
4. After students have compiled their position statements, have them present their best case to the opposing pair. Explain that both students in a pair must participate in the presentation, and they should try to be as persuasive and convincing as possible. Advise members of the opposing pair to take notes during the presentation, to critically evaluate the arguments presented, to challenge the information and reasoning of the presenters, and to ask for clarification of any point they do not understand.
5. Ask students to argue forcefully and persuasively for their position, presenting as many facts as they can to support their point of view. They should analyze and critically evaluate the information, rationale, and inductive and deductive reasoning of the opposing pair, asking for the facts that support each point of view. Students must refute the arguments of the opposing pair and rebut attacks on their own position. During the discussion, they should try to differentiate the two positions and assess the degree of evidence and logic supporting each position. Refer students to the rules identified on the Student Handout. Ask them to follow these rules as they debate the issue.
6. Have the pairs reverse perspectives and present each other's

See the Perspective on page 17 for background information.

166

positions. In arguing for the opposing position, students should be forceful and persuasive, and they should add any new information that the opposing pair did not think to present. Encourage students to try to see the issue from both perspectives.

7. Have pairs drop advocacy of their position and work with the other pair in their group to synthesize and integrate what they know into factual and judgmental conclusions. They should then summarize their conclusions in a joint position statement to which all sides can agree. Students should (a) write a report, (b) present their conclusions to the class with all four members participating orally in the presentation, and (c) process how well they worked together and how they could be even more effective next time. Evaluate their written reports in terms of the quality of the writing, the logical presentation of evidence, and the oral presentation of the report to the class. Point out to students that this activity centered around a real court case that was decided during the 1996 term of the Supreme Court. Then share the Court's decision with the class.

Resources

Johnson, D. W. *The Social Psychology of Education.* Edina, MN: Interaction Book Company, 1970.

Johnson, D. W., and F. Johnson. *Joining Together: Group Theory and Group Skills,* 6th ed. Boston: Allyn & Bacon, 1997.

Johnson, D. W., and R. Johnson. *Cooperation and Competition: Theory and Research.* Edina, MN: Interaction Book Company, 1989.

Johnson, D. W., and R. Johnson. *Creative Controversy: Intellectual Challenge in the Classroom,* 3rd ed. Edina, MN: Interaction Book Company, 1995.

New Law-Related Instructional Resources Available!

Adolescents, Society and the Law: Interpretive Essays and Bibliographic Guide (Teaching Resource Bulletin #5). Authored by Roger J. R. Levesque of Indiana University, this 48-page publication contains introductory essays and annotated bibliographies on various aspects of the subject, including adolescents' personal relationships vis-à-vis the law, "problem youth" and access to the legal system, the law's role in determining access to health and community services, adolescent civil rights, and cross-national perspectives on these topics. A unique reference resource for scholars and teachers in the social sciences, psychology, and law.

Just Images: Television News Coverage of High-Profile Criminal Trials. A 15-minute video containing television footage, photographs, and interviews with parties to prominent criminal trials of the 20th century. Produced by the ABA in cooperation with the Chicago-based Museum of Broadcast Communications, the video is narrated by Jonathan Towers, producer of cable television A&E's *American Justice* series. The video examines the ways in which television and other media have covered trials from the 1920s to current times, focusing in particular on the famous trials of Sam Sheppard, the Chicago Seven, Wayne Williams, John Hinckley Jr., the Menendez brothers, and William Kennedy Smith.

The Death Penalty: A Scholarly Forum. From *Focus on Law Studies: Teaching About Law in the Liberal Arts,* published by the Commission on College and University Legal Studies of the American Bar Association, Spring 1997, Volume XII, Number 2. Eight scholars from law, the social sciences, and humanities discuss and debate capital punishment as a matter of scholarship, public policy, and classroom teaching. This conversation is an edited version of a two-week–long online discussion during February of 1997. To read the entire discussion, see the web site of the American Bar Association's Division for Public Education at http://www.abanet.org/publiced.

For further information and/or to order the above publications, contact John Eden, ABA Division for Public Education, 541 N. Fairbanks Court, Chicago, IL 60611-3314; (312) 988-5736; e-mail: edenj@staff.abanet.org.

Student Handout

Controversy: Who Is Responsible?
Academic Controversy Task

You have been assigned an actual or hypothetical case situation involving civil law. One half of your group will develop and advocate the best possible arguments for the plaintiff in the case. The other half will develop and advocate the best possible arguments for the defendant. Your goal is to proceed through the controversy procedure and reach your best-reasoned judgment as to how responsibility should be determined. Write one report for the group. All members have to agree with the report. All members have to be able to explain the decision made and the reasons why the decision is a good one.

Procedures for the Academic Controversy Process

1. Research and prepare your position.
2. Present and advocate your position.
3. Open discussion.
4. Reverse perspectives.
5. Synthesize and write a group report.

Rules for Participating in the Academic Controversy Process

1. I am critical of ideas, not people. I challenge and refute the ideas of the opposing pair, but I do not indicate that I personally reject them.
2. I remember that we are all in this together. I focus on coming to the best decision possible, not on winning.
3. I encourage everyone to participate and to master all the relevant information.
4. I listen to everyone's ideas even when I don't agree.
5. I restate what someone has said when it is not clear to me.
6. I first bring out all ideas and facts supporting both sides, and then I try to put them together in a way that makes sense.
7. I try to understand both sides of an issue.
8. I change my mind when the evidence clearly indicates that I should do so.

Teaching Strategy

Tort Law and the Civil Jury

Keith A. Pittman

Update on Law-Related Education, 21.3, 1997, pp. 44–46. © 1997 American Bar Association.

Background

The tort system in this country is under constant and intense public scrutiny. Governmental and private entities catalog the number, types, and results of civil claims to evaluate the efficiency of the tort system. Federal and state legislatures balance the rights of persons with meritorious claims to have access to the courts against proposals aimed at reducing the number of suits. Consumer and business groups do battle over the propriety of curbing the individual's right to seek redress in the courts.

To provide students with a basis for understanding this ongoing public debate, this lesson introduces them to the tort system and the civil jury. Students will have the opportunity to consider the manner in which social problems are addressed through the tort system and the community's role in setting standards for proper conduct.

Objectives

As a result of this lesson, students will

- Examine societal problems that the tort system seeks to address
- Research issues underlying the tort system
- Engage in a jury exercise that examines the manner in which community standards are imposed through a civil jury trial

Target Group: Secondary
Time Needed: 4–5 class periods
Materials Needed: article "Tort Law and the Civil Jury," Student Handouts 1 and 2, one each per group
Optional Resource Person: Lawyer

Procedures

1. Introduce the lesson by establishing students' background knowledge about the legal system. Perhaps invite a lawyer to participate in the discussion. Focus the discussion on these questions.
   —What is a lawsuit and how is it handled?
   —What is the source of students' opinions about lawsuits and lawyers? (perhaps movies or television) Is it likely that their opinions are skewed or not grounded in fact?
   —Have students or their family members been involved in a lawsuit or other type of case as a party, witness, or juror? What was the result of the case?
   —What kinds of lawsuits have students heard about in the news, for example, the suits brought against the tobacco companies by the states' attorneys general?
   —What do students think about a plaintiff, the person bringing the suit, claiming that he or she has the right to recover money damages from someone who the plaintiff has said was responsible for an injury or death?

See the article on page 13.

2. Assign the article "Tort Law and the Civil Jury" on pages 13–16 for reading. Discuss the article's main points with students.
3. After the class has read and discussed the article, conduct a mock jury exercise. Divide the class into groups of six students if possible. Six is often the minimum number of jurors permitted for a civil jury. Have each group select a foreman and then distribute Handout 1. Discuss the negligence charge before the groups deliberate on their verdict and questions. Point out that they can return a verdict against one or any of the participants in the collision. Also explain the concept of comparative negligence, in which jurors may apportion responsibility among the participants by percentage.
4. Distribute Handout 2. Have students reconsider their verdicts and questions given the new circumstances described in each item. Conclude the activity with a class discussion of the results.

Student Handout 1

Jury Deliberation (Part I)

Terry was driving his sports utility vehicle home from work. He was driving in the inner lane, the lane closest to the center line, on a four-lane road. As Terry's car rounded a curve, Mel's pickup truck crossed the center line, heading toward Terry's vehicle. Terry swerved his vehicle into the outer lane to avoid Mel's truck just as Juanita pulled her car out of her driveway. Juanita hit Terry's vehicle, which slid sideways and then rolled over. Terry was thrown from his vehicle and died from injuries he received in the accident.

Does this case involve negligence? A judge charges that the law to be applied is as follows: "Negligence is a failure to exercise the ordinary care that a reasonably prudent person would exercise under the same or similar circumstances. The party who breaches the standard of conduct raised by the law for the protection of others and causes an injury is the person responsible for the damage suffered as a result of the breach of duty. To be negligent, a party does not need to anticipate the particular consequences that occurred. It is sufficient that he or she might have been able to foresee that some injury would result from his or her conduct. One who is not negligent is entitled to presume that others will exercise due care. It is not negligence to fail to anticipate danger that can result only from a violation of law or duty by another individual. People are under an obligation to use ordinary care to avoid injuring others after finding them in a dangerous place, regardless of how they got there, and are liable for the failure to do so."

1. Who is to blame for Terry's death: Mel, Juanita, Terry, or any combination of the three?

2. What else would you like to know, if anything, before deciding who is responsible?

Student Handout 2

Jury Deliberation (Part 2)

Consider each of these circumstances. Would your verdict in Part 1 have been different if you had known about these circumstances? If so, how would your verdict have been different? Explain your reasoning.

1. Terry was driving 50 mph, and the speed limit was
   (a) 30 mph, (b) 35 mph, or (c) 45 mph.

2. Mel was driving 50 mph, and the speed limit was
   (a) 30 mph, (b) 35 mph, or (c) 45 mph.

3. Mel was
   (a) one foot, (b) two feet, or (c) five feet across the center line.

4. Mel crossed the center line because
   (a) he was avoiding a child,
   (b) he was avoiding a dog, or
   (c) the road is sloped improperly for its speed limit
   (Should the transportation department and/or the road builder be a defendant?)

5. Terry swerved his vehicle when it was
   (a) 50 feet, (b) 100 feet, or (c) 200 feet from Mel's truck.

6. When Juanita pulled out,
   (a) she did not look in Terry's direction or (b) the sun was in her eyes and she could not see Terry's vehicle.

7. (a) Terry or (b) Mel was hurrying (driving 15 mph above the speed limit) because he had heard that his house was on fire.

8. The report about the fire at Terry's or Mel's house was a co-worker's practical joke. Should the co-worker be a defendant and what result?

9. (a) Terry (b) Mel or (c) Juanita was
   driving while under the influence of alcohol at the time of the collision.

10. Terry was thrown from the vehicle because
    (a) the sport utility vehicle rolled over as a result of a design defect (should the auto maker be a defendant and what result?),
    (b) Terry was not wearing his seat belt, or
    (c) both.

Student Forum

Is Our Nation Too Litigious?

Rita G. Koman

Update on Law-Related Education, 21.3, 1997, pp. 47–51. © 1996 American Bar Association.

A Note to Teachers: This forum is a student-organized role-play that will extend student thought on the growing controversy about whether the United States has become too litigious. Students will be asked to incorporate information provided in the *Update* articles with independent research to form opinions about this controversy.

Students are responsible for the forum. Your role is to provide copies of materials and serve as a consultant. Roles have been developed to bring out diverse perspectives and illustrate the complexity of this issue. You might want to select relevant readings and use teaching strategies that will give students the background needed to participate in the forum. News articles about court suits and actions can be found almost daily.

The forum should take from two to five class periods, depending on the number of roles and the amount of discussion, and whether or not the class chooses to invite guest speakers. Independent research will elevate the quality of student presentations and overall scholarship. You or your students may elect to use all the sample roles provided, or you may revise or replace them. Make sure that the roles represent diverse philosophical viewpoints.

To the Student

This forum will give you an opportunity to take responsibility for your own learning. It is similar to a panel discussion in which people come together to debate issues. The activity will help you explore other people's views on the complex controversy of whether Americans are too litigious and examine your own views as well.

During this forum, you will consider the impact on the national economy and societal resources that the growth in litigation has produced. While litigation case percentages seem to hold steady, the increase in case numbers rises in correlation with population growth. Nearly everyone wants his or her "day in court," but are we as a nation losing track of who is responsible? Litigation is not cheap—what are the costs involved? Who pays? What has happened to our personal values when the desire for monetary revenge seems to drive our civil justice system? Should lawsuits be limited to those who can afford an attorney or does fair-mindedness demand public defense for the poorer members of our society?

Rita G. Koman taught secondary American history and government for 18 years. She is now a consultant and researcher living in Manassas, Virginia.

Some questions you might consider during the discussion are

- Are state and federal court systems suffering from overload?
- Is there a place for small claims or mediation courts?
- Have high damage awards in malpractice cases escalated health-care costs?
- What impact have gender and age discrimination suits had upon schools and businesses?

How to Conduct the Forum

1. The class selects 10 students to serve on the panel.
2. All students complete the pre-forum ballot and submit it to the panel.
3. Students form groups to develop or adapt forum character roles.
4. Students identify community members to invite to participate in the forum. Community members may represent themselves, serve as coaches for the panelists, or play one of the roles. Include your teacher in making plans to invite guest speakers.
5. The panel selects a facilitator and clerk from among student volunteers. The facilitator coordinates speakers and maintains order if necessary. The clerk records key ideas expressed.
6. The panel conducts the forum.
7. All students complete a post-forum ballot. The panel reviews, compares, summarizes, and reports the results to the class.

8. Students discuss how the forum presentation might have changed their opinions.

Getting Ready

To prepare for this forum, review literature, including *Update* articles, magazines, and newspapers. Contact professionals who can help you prepare for the forum or who might participate. Professionals include business owners, lawyers, judges, police officers, social workers, medical and rescue personnel, news reporters and editors, prosecuting attorneys, and public defenders.

Background

The threat of lawsuits has impacted many organizations and individuals. Nonprofit organizations, such as volunteer fire departments, are finding it difficult to recruit helpers. Many doctors fearing malpractice suits carry expensive insurance and/or practice defensive medicine by ordering diagnostic tests of questionable merit. With the growing number of consumer-protection agencies throughout the nation, companies are cautious about offering new products to the general public. Discrimination suits have led employers to refuse to provide any information, good or bad, about former employees to avoid potential litigation. There appears to be a correlation between litigation costs and the prices that businesses pass on to consumers.

In a democratic society, the civil justice system should be equally accessible to everyone. Yet in the United States, affluent people seem to have better access than the poor. Many poor and middle class people cannot afford to pursue lawsuits against a drunken driver, a cheating manufacturer, or a negligent landlord. In some larger populated areas, legal pro bono services help these individuals. Of course, the size of the indigent caseload may slow the wheels of justice down.

It may seem like everyone is suing someone; about 25–30 million cases clog the courts. Yet, most cases are concerned with domestic relations, real estate or business matters, and small claims. Sometimes the most notorious tort cases, 1 to 2 percent of the cases, result in changes in the law. The mandatory adoption of air bags for front seat drivers and passengers—now in widespread contention—is one such example. Litigation is a hot issue in the United States. As such, it will only continue to escalate with population increases and growing demands for justice from the court system.

Introduction

Roles The following people have agreed to discuss their views and positions in a panel discussion. They represent the interests of various individuals who have been involved in court proceedings for a variety of reasons. Students playing the roles should have five minutes to present their positions and to answer questions from the audience. Students in the audience may play the role of reporters covering the discussion and residents of the community. When questioned by the audience, the students should answer in a manner consistent with their roles.

Role 1: Carolina Ramirez I am Carolina Ramirez. I serve as counsel to a large corporation that produces designer telephones. In the period of economic downturn a few years ago, the corporation downsized to cut overhead costs. This meant letting a number of middle-level managers go and closing down some of our retail outlets. Some of our former employees tried to sue for damages, arguing they were discharged so that the company could avoid paying their benefits. I was able to prove in court that that was not true by illustrating our economic shortcomings with detailed graphs and pointing out the fact that severance pay was given to employees with 20 or more years of service to the corporation. Since then, I have created a contract for new employees with contingencies in their benefit packages to avoid such problems in the future.

Role 2: Randall Brownstone Hello! I am Randall Brownstone. My friends call me "Brownie." I work for our city as a street cleaner. My wife works as a part-time cook at the elementary school our two children attend. Between us, we barely make a living wage, so we are forced to live in low-cost housing. Besides being noisy and dirty, our apartment building seems to constantly have problems. Windows are always being broken, and residents find their owner-provided garbage cans are usually overflowing, inviting roaches and rodents to roam freely. Last week our kitchen sink backed up when my wife tried to empty the dishwater. It took the landlord three days to fix the problem. The power in our building goes out in every major storm or on very hot days when everyone runs window fans. Consequently, most of the people in our building have contacted legal aid to help us go to court to force our landlord to be a more responsible owner. We feel we should have the right to sue him in order to have better living conditions.

Role 3: Marcus G. Windsor Good morning! My name is Marcus G. Windsor, and I am the CEO of Good Luck Insurance Company of West Haven, Connecticut. Our company carries policies on homes, autos, personal property, and small businesses. In recent years, because of the volatile weather in this nation, we have had to pay out enormous amounts of money to clients for hurricane, tornado, flood, and other storm damage. Consequently, we have found it necessary to raise our rates for customers and be more selective as to whom and where we offer insurance. I firmly believe in paying legitimate claims, but some people have knowingly made false claims just for the money. As a result,

I have been in contact with members of the U.S. Congress to initiate a bill to limit the amount of damages I am liable for during natural disasters.

Role 4: Rita Foster My name is Rita Foster. I am a single mother of three children, ages 10, 12, and 15. I dropped out of high school to marry a man I expected to spend the rest of my life with, but he deserted us 10 years ago. He works as a cross-country truck driver, so he is often difficult to find. As a sales clerk in a hardware store, I make little more than minimum wage. It took me five years to find my former husband after he left us near destitute and on welfare. Under the current laws, the courts can help me keep child-support payments coming. Since my former husband is frequently late with his payments, I can go to court to force him to maintain his financial responsibilities through wage garnishment until all of our children are 18. I am grateful that the system is there to help me out when I need it.

Role 5: Wayne Devonshire Hello, everybody. My name is Wayne Devonshire, and I am a high school athletics director and former football coach. When I first started coaching, there were four basic competitive sports for boys—football, basketball, baseball, and wrestling. Girls played intramural field hockey, basketball, and softball. Now, we also offer tennis, golf, swimming, soccer, and volleyball. The biggest change, however, is that girls' sports are no longer intramural but competitive like the boys. I now spend all of my time working out playing schedules for all the major competitions for both boys and girls and making sure that my finances are spread equally between the boys' and girls' programs. It has become a nightmare of fund raising and public relations for scouts to line up all the seniors for potential scholarships. I'd rather return to the time when girls weren't involved competitively!

Role 6: Sandra P. Jaworski Hello! I am Sandra P. Jaworski, the founder and president of the Schoolhouse Toy Factory. I love children and enjoy producing playthings for them, but in the last decade or so, parents have become vicious! They seem to think a child's toy should last forever, no matter what the child does to it! It seems I am responsible for anything a child could put in his or her mouth or eyes, a product that might catch on fire, or a toy not used properly. At some point, society has to draw the line and demand parents be liable for watching their own children play! They are the ones who are responsible for their children's behavior. I cannot possibly foresee everything children might do with my products.

Role 7: Jeanne Wagner I am Jeanne Wagner, a suburban homeowner. Two years ago, my family and I moved into a new two-story house. One side of our house and the garage were covered with white siding while the rest of the house was brick. About six months ago, I noticed a brown substance leaking out between the siding layers. This substance is unsightly and hard to remove. Additionally, the siding appears to be buckling. Immediately, I tried to contact the builder, but he had left the area. After much detective work, I discovered the manufacturer of the product. When I contacted the company, I was told the product was no longer in production and the company could not do anything about my problem. That's when I went to small claims court and got a judgment holding the company responsible for selling an inferior product. Currently, the company is paying for the removal of the old siding and the installation of new siding guaranteed for 20 years.

Role 8: Andy Samuelson I'm Andy Samuelson, the County Sheriff. I have been in the Sheriff's Department for nearly 30 years and have seen a lot of changes around here. When I first started in the department, the county was largely rural. Now every time you turn around, another housing development is going in. The 80 deputies in the department must work overtime to handle the increasing workload. The number of automobile accidents has risen. Drug peddling and incidents tied to drugs, such as muggings and robberies of homes and businesses, are up. In fact, all crimes are rising! My officers spend almost as much time in court these days as they do out on the streets. Yet, more and more demands are placed on the officers—older peo-

ple complain about the rowdiness of teenagers; law-abiding citizens demand we ticket speeders and aggressive drivers. We just can't be everywhere, especially when nobody wants to pay higher taxes to fund an increase in my staff and buy more vehicles with more sophisticated equipment.

Role 9: Christopher Makita Hi! My name is Christopher Makita. I'm 16 and the recent victim of a car crash. My buddy Joe Valentino and I were on our way to pick up our dates for the prom last month. At Broad and Maple Streets, I drove through the intersection on the green light when this car ran the red light and slammed into my car. It's a good thing we were both wearing our seat belts and the car had airbags because my car was totaled! I suffered a double-fractured leg and minor cuts and bruises. Joe just had minor cuts and bruises. My lawyer informed me that the driver of the other car was dead at the scene, but we can sue his parents since they owned his car. We intend to go to court and ask for damages to pay my medical expenses and replace my car.

Answers to Civil Law Terms You Need to Know—Page 56

1. damages
2. plaintiff
3. claim
4. punitive damages
5. defendant
6. liable
7. alternate dispute resolution
8. tort
9. negligence
10. remedy

Answers to Check Out the Supreme Court!—Page 30

1. T
2. T
3. T
4. F—in reverse order of seniority
5. T

Bonus:
Stevens, Scalia, Thomas, Kennedy, O'Connor, Souter, Breyer, Ginsburg, Rehnquist

Quack, Quack, Who's There?

Someone once said that if it looks like a duck, walks like a duck, and quacks like a duck, it must be a duck. Well said, but we cannot duck the question of who is in charge of rubber ducks. The promoters of Pittsburgh's summer festival were planning to dump thousands of rubber ducks into the Allegheny River for a "race."

Rubber duck races have become a fund-raising staple, with organizers signing up duck sponsors for about $5 a duck as a donation to charity. Thousands of these wingless fowls are then dumped into a river or other body of water, and the waves, tides, flow, or swimmer enhancement push them over the finish lines. Winners—the people holding the tickets, not the ducks—receive prizes.

Great American Duck Races (motto: "Our ducks net you big bucks") has built an international business by providing event organizers with duck-race know-how and rubber ducks leased at 45 cents apiece. Clients receive a 350-page manual, a "Quack Track" software program, and a newsletter that follows the "duck race circuit."

Last year, the company provided about 40,000 rubber fowls for the Pittsburgh regatta, but this year event organizers decided to sponsor a 20,000-duck race without Great American's ducks. Great American cried foul, contending that the race violated an agreement forbidding the regatta from sponsoring its own race for at least a year after cancellation. In the lawsuit, the company, which was considering holding its own duck race in Pittsburgh, argued that competing races dilute attendance.

In response, regatta officials said that the noncompete agreement was stricken from their contract. Besides, they said, they returned all of Great American's ducks and other materials a year ago, and they have sponsored other duck races in the past without any help. A judge has ruled that Great American's request for an injunction to stop the duck race would not fly, but the battle over damages goes on.

Adapted from The Wall Street Journal, *July 18, 1997, p. B1.*

Forum Ballot

Is Our Nation Too Litigious?

Circle the choice that best answers how you feel about the growth of litigation in the United States.	strongly agree				strongly disagree
1. Are our state and federal courts being overloaded with personal injury cases?	1	2	3	4	5
2. Should courts make it more difficult to bring frivolous lawsuits?	1	2	3	4	5
3. Should alternative programs, such as mediation, be used to settle disputes outside the courtroom?	1	2	3	4	5
4. Should experts to be allowed to serve on juries?	1	2	3	4	5
5. Do you think costly lawsuits discourage the development of new medications and better products of all kinds?	1	2	3	4	5
6. Should we limit liability lawsuits and also make businesses more accountable for their products?	1	2	3	4	5
7. Does the number of people who cannot afford to bring their claims to court bother you?	1	2	3	4	5
8. How concerned are you about threatening lawsuits that could force volunteer programs in your community to close?	1	2	3	4	5
9. Should judges provide juries with more help to do their jobs properly?	1	2	3	4	5
10. Would limiting damage awards in malpractice cases help hold down growing health-care costs?	1	2	3	4	5
11. Do you think Americans turn more often to the courts when they are injured than people in other countries do?	1	2	3	4	5
12. Do you think there are problems with costs and delays in civil cases?	1	2	3	4	5
13. Do you think the cost of product liability claims render American products noncompetitive on the world market?	1	2	3	4	5
14. Do foreign manufacturers benefit because American manufacturers are subject to U.S. laws regarding product liability?	1	2	3	4	5
15. Do you think juries are sympathetic to the injured party in a lawsuit because juries tend to be made up of those who are unemployed and uneducated?	1	2	3	4	5
16. Do you think Americans are overly litigious?	1	2	3	4	5

Write a short answer. Which do you think is most important: an individual's right to go to court, an individual's right to legal counsel, revamping the entire court system, limiting financial rewards in injury or malpractice suits, or organizing alternatives to the court system? Explain.

Teaching Strategy

Using the Civil Law Poster

Update on Law-Related Education, 21.3, 1997, pp. 52–54. © 1997 American Bar Association.

Objectives

- To define civil law and identify its processes
- To compare the use of concepts in terms of their application to civil law and criminal law
- To describe torts as one type of civil law case

Materials: poster "Civil Law," Student Handouts 1 and 2

Define It

1. Encourage students to use the glossary on page 60 to write their own easy-to-understand definitions of terms included on the poster. Students could incorporate their definitions into an ongoing legal dictionary in which they include law-related terms they encounter throughout their studies.
2. Reinforce the understanding of civil law-related terms by having pairs of students design crossword puzzles. Then pairs can exchange and solve each other's puzzles.

Civil vs. Criminal

The poster lists who and what are involved in civil cases. Ask students to use this and research information to prepare a chart comparing civil cases to criminal cases. The chart should show the similarities and differences between the two types of law cases. For example, in both types of law, a plaintiff, or accuser, is involved. In a civil case, the plaintiff is the person or organization who filed the lawsuit. In a criminal case, the plaintiff is the government representing the people of the municipality, state, or nation.

In the Flow

1. Review the steps of the civil law court procedures identified on the poster. Ask students to prepare a flowchart that shows the different ways in which a case may be decided, i.e., pretrial settlement, jury verdict, and judge's decision. Encourage students to review the article on page 10.
2. Divide the class into six small groups. Three groups will brainstorm reasons why they would support state-required pretrial settlement negotiations. One of these groups will consist of defendants, one of plaintiffs, and one of judges. Their arguments would be from the perspective of their role. The other three groups would be similarly composed, but brainstorm arguments in opposition to state-required pretrial settlement negotiations. Students may need to do some research on pretrial settlements. Provide time for this research. After they have created their arguments, have representatives from the groups present their ideas in a point-counterpoint discussion. Begin with defendants, then plaintiffs, and finally judges. Discuss with students how their arguments were influenced by the role they played. Ask them to decide which arguments were the most persuasive.

The "Civil Law" poster identifies the types of cases and the process that civil law embodies. Use the poster as a teaching tool to introduce and reinforce civil law concepts. Also see "Civil Procedure" on page 10, and share the flowchart with students.

Student Handouts

1. Distribute copies of the Student Handouts 1 and 2. Discuss the facts and graphs on the handouts. Help students interpret the graphs by asking questions such as these: Are there more criminal or civil cases in state courts? (civil) Do state courts hear a greater percentage of contract cases or tort cases? (contract cases)
2. To ensure that students understand the difference between contract disputes and torts, ask them to write descriptions of two hypothetical situations—one involving a contract dispute and one describing a tort. Each student should read his or her descriptions to the class and ask volunteers to identify which case involves a tort.

Student Handout 1

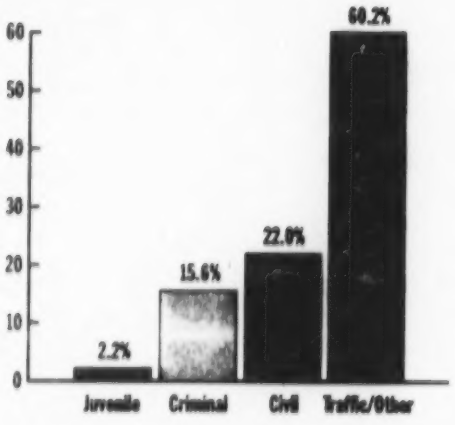
What Is Tort Law?

Tort law is one type of civil law. It involves torts, or harmful actions for which the injured party has the right to payment for damages. A tort may result in injuries to a person's body, property, business, reputation, or privacy. Failure to keep a promise or to carry out the terms of a contract are not torts. Contract law usually addresses such failures.

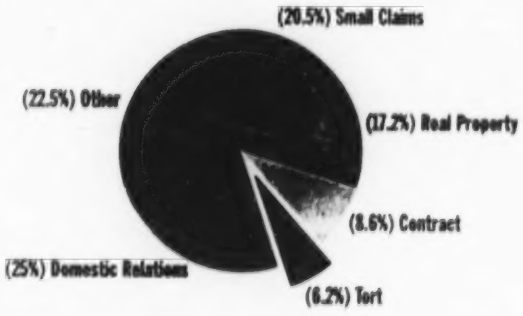
Current Facts in Tort Law

Personal injury cases are part of the tort law caseload, and tort law cases made up just 6.2 percent of the civil cases filed in state courts in 1994. Excluding small claims cases, tort cases make up less than 2 percent of the total civil and criminal caseload in state courts.

State Court Caseloads—1994



State Civil Lawsuit Filings—1994



Juvenile	Criminal	Civil	Traffic/Other
1,897,469	13,481,778	19,004,662	52,072,396

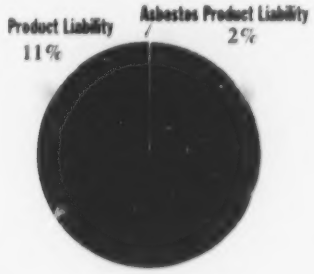
Source: Facts About the American Civil Justice System, *American Bar Association.*

Student Handout 2

Current Facts in Tort Law (continued)

In 1995, product liability cases accounted for 11 percent of all civil law cases filed in federal courts. The product liability of a single product—asbestos—accounted for 2 percent of all the civil cases filed in federal court. That's about one-fourth of the product liability cases in federal court.

Federal Civil Lawsuits Filed in 1995



According to a study released in 1996, juries find in favor of the plaintiff in product liability cases 44 percent of the time.

Jury Decisions in Product Liability Cases

Punitive damages are awards of money in excess of actual damages. Punitive damages are designed to punish the liable party. Between 1965 and 1990, punitive damages were awarded in only 355 product liability cases.

Teaching Strategy

Learning About Congress

Update on Law-Related Education, 21.3, 1997, p. 55. © 1997 American Bar Association.

Objectives

- To identify appropriate representative and senators
- To understand the role and composition of the United States Congress
- To describe issues facing Congress

Materials: article "Update on Congress"

Have students use newspapers; reference materials such as the Congressional Quarterly, magazines, and encyclopedias; and/or the Internet and televised congressional sessions and hearings to find answers to these questions:

Knowing Congress

1. How many congressional districts does your state have? In what congressional district do you live? Who is your congressional representative? How long has he or she served? Who are the senators from your state? How long has each senator served?
2. Ask student partners to choose a bill that Congress has recently passed or one that is in the process of being considered by Congress. Have them do research to trace what happened to the bill from its first introduction to its present status. Suggest that they prepare a flowchart to show the bill moving from stage to stage through Congress. If they have chosen a recently passed bill, students should chart information about the numbers of pro and con votes for the bill and whether the bill has been signed into law by the President.
3. Explain that much of the work in Congress is handled in committee. Ask students to investigate the work of one of the congressional committees such as the House Ways and Means, Appropriations, Judiciary, and Rules committees and the Senate Armed Services, Foreign Relations, and Judiciary committees. What are the purpose and function of the committee? What type of legislation is the committee responsible for and what legislation has the committee recently proposed?

Issues

1. Have students choose one of the issues facing Congress discussed in the article "Update on Congress" on pages 31–32. They should research information about the issue and write a position statement that identifies their opinion about the issue and cites reasons for it. Once they have formed their opinion, have students contact their congressional representative's office—by telephone, letter, or E-mail—to explain their position and ask the congressperson to support it.
2. As reported in "Update on Congress" (see page 31), the Supreme Court recently overturned a congressional law because it violated the First Amendment right to freedom of expression.

"Update on Congress" on page 31 describes several issues Congress must address.

Have students use the Internet to find articles about First Amendment rights cases heard by the Supreme Court. They may also find information in earlier editions of *Update on Law-Related Education*, magazines, newspaper, and other resources. Ask students to skim each article to identify which First Amendment right was involved, what the Court's findings were, whether the case involved a law passed by Congress, and what that law was. Encourage them to chart the information and to use their charts to discuss how the laws that Congress passes can be overturned by the Supreme Court.

3. Point out to students that the Constitution provides a system of checks and balances among the three branches of the federal government to ensure that no branch oversteps its power. Discuss how Congress can check the power of the executive and judicial branches and how these branches can check the power of Congress. Ask students how the Supreme Court's overturning of a congressional law helps protect the rights guaranteed by the Constitution.

Civil Law Terms You Need to Know

Throughout *Update on Law-Related Education,* you have been introduced to terms related to civil law. The definitions of some of those terms follow. You can use the number-letter code to help you identify the term defined. Also check the glossary on page 60 as necessary.

1 A	2 B	3 C	4 D	5 E	6 F	7 G	8 H	9 I	10 J
11 K	12 L	13 M	14 N	15 O	16 P	17 Q	18 R	19 S	20 T
21 U	22 V	23 W	24 X	25 Y	26 Z				

1. payment of money awarded to a person or group for losses due to an injury caused by the unlawful or negligent acts of another

4 1 13 1 7 5 19

— — — — — — —

2. party who files a lawsuit or action, complainant

16 12 1 9 14 20 9 6 6

— — — — — — — — —

3. an assertion that the suing party has been injured by the action of another party

3 12 1 9 13

— — — — —

4. an order to pay money as a form of punishment or deterrence from future actions of the same kind

16 21 14 9 20 9 22 5 4 1 13 1 7 5 19

— — — — — — — — — — — — — — —

5. the party being sued in a civil case, respondent

4 5 6 5 14 4 1 14 20

— — — — — — — — —

6. responsible and accountable

12 9 1 2 12 5

— — — — — —

7. alternatives to civil trial such as mediation and arbitration

1 12 20 5 18 14 1 20 5 4 9 19 16 21 20 5

— — — — — — — — — — — — — — — —

18 5 19 15 12 21 20 9 15 14

— — — — — — — — — —

8. a wrongful act, injury, or damage for which a lawsuit may be filed

20 15 18 20

— — — —

9. failure to use ordinary care; carelessness

14 5 7 12 9 7 5 14 3 5

— — — — — — — — — —

10. relief awarded to a plaintiff

18 5 13 5 4 25

— — — — — —

Resources for Teaching

Multimedia Resources on Civil Law

Paula A. Nessel

Update on Law-Related Education, 21.3, 1997, pp. 57–59. © 1997 American Bar Association.

Article

Bjorklun, Eugene C. "Teaching about Personal Injury Law: Activities for the Classroom." *Social Studies* 86.2, (Mar–Apr 1995): 78–84.

Presents five teaching activities about personal injury law. Provides hypothetical situations and discusses how they probably would be decided in the courts. (Available in the periodical section of libraries or through ERIC [document #EJ507489], at 800/538-3742)

Board Game

Blind Justice: The Game of Lawsuits

For three or more players or teams. Some players act as attorneys in a series of intriguing cases based on actual civil trials. Other players act as jurors and render verdicts. Teaches courtroom procedures and legal principles. Time: 1 or more hours. Grades 6 and up. GR103-V7 $25.00 Contact Social Studies School Service, 800/421-4246.

Books/Booklets

To order the following ABA publications, call 800/285-2221.

Facts About the American Civil Justice System

This spiral-bound booklet with computer disk provides information about the civil justice system. 13 pages. $19.95 (PC #157-0005)

The American Bar Association Family Legal Guide

Practical information on a wide variety of contracts, on buying or selling a home or car, renting an apartment, or using a credit card. It covers the legal facts on marriage, separation, and divorce. It answers the most frequently asked questions on legal topics such as personal injury lawsuits, wills and estates, bankruptcy, and the law of the workplace. 752 pages. $35.00. (PC #235-0024)

Paula A. Nessel is program manager for school programs in the American Bar Association Division for Public Education in Chicago.

I'm the People—Resolving Conflicts

Promotes nonviolent ways of resolving disputes, including negotiation, mediation, and arbitration. The booklet contains lesson plans for both teachers and lawyers, activities for grades K–3, 4–6, 6–8, and 9–12, and a teaching poster. 40 pages. $11.95. (PC #497-0086)

Conflict Resolution: What Are Its Foundations, Practices, Successes ... and Future?

This spring 1996 edition of *Update on Law-Related Education* addresses topics such as peer mediation; youth center conflict resolution programs; diversity and conflict resolution; creating peaceable schools; and children, courts, and dispute resolution. 48 pages. $6.00. (PC #738-0100-2002)

Everybody Wins: Mediation in the Schools

Practical tips on creating school-based mediation programs in elementary through high school. The authors have successfully created programs in a variety of settings. 16 pages. $5.00. (PC #497-0039)

The American Bar Association has the following guides for $12.00 each.

The American Bar Association Guide to Home Ownership, 193 pages. (PC #235-0028)

The American Bar Association Guide to Wills and Estates, 226 pages. (PC #235-0029)

The American Bar Association Guide to Family Law, 184 pages. (PC #235-0034)

The American Bar Association Guide to Workplace Law, 196 pages. (PC #235-0038)

The American Bar Association Guide to Consumer Law: Everything You Need to Know About Buying, Selling, Contracts, and Guarantees. 260 pages. (PC #235-0037)

The American Bar Association has the following booklets for $2.50 each.

Getting and Keeping Credit: Your Guide to Credit Cards and Credit. 18 pages. (PC #235-0033)

Dealing With Debt: Your Guide to Bankruptcy and Other Options. 24 pages. (PC #468-0053) [See companion videotape PC #486-0052]

Curriculums/Lessons

Civil Justice

Co-authored by the Constitutional Rights Foundation and Scholastic, *Civil Justice* dramatizes how the legal system affects teenagers. The text explains steps students can take to protect their rights as citizens, consumers, workers, witnesses, and family members, using role-plays, dramatic stories, simulations, and community projects. Grades 7–12. Student Edition, 220 pages $10.25; Teacher's Guide, 55 pages $9.70; Print Master Set, $19.95. Contact Scholastic, 800/325-6149.

Civil Law Mini-Trials

Helps students learn simplified trial procedures and the basics in various civil law areas including contracts, torts, and negligence. Provides 50 cases and their verdicts, based on real cases around the country. There are instructions for using the cases in both a "Face the Facts" game and "one-on-one" mini-trial competitions. Grades 4–12. 60 pages FREE, while supply lasts. Contact New York State Bar Association's Law, Youth and Citizenship Program at One Elk Street, Albany, NY 12207-1002, 518/474-1460, E-mail: lyc@nysba.org.

Decisions: Civil Law

A casebook in which legal questions relevant to teens are presented through reprints of published comic strips and clear explanations of actual cases. It includes matters involving contracts and sales, property, wills, check, mortgages, and torts. 62 pages. S339-2. Grades 7–12. $4.50 (Answer Book with answers for both Criminal Law and Civil Law books—S339-3 $4.50) Contact Amidon Graphics, 800/328-6502.

Consumer Law L52

Covers the development of consumer law from court decisions to government regulations, contracts, warranties, credit, debtor protection, and defective product recourse.

Family Law L53

Addresses how the law defines marriage, upholds the responsibilities of spouses, imposes duties on parents, and permits a family to break up.

Tort Law L55

Students learn the guidelines for compensation and the prohibition of injuring another without justifiable cause.

The three text-workbooks above are $8.50 each. Contact South-Western, 800/543-7972.

The People's Guide to Civil Law

Introduces the basics of lawsuits and the court system, then has individual units on sales, contracts, warranties, insurance, liability, civil rights, property, family law, landlord/tenant law, and wills. Reading level: Grades 3–4. Interest level: Grades 7–12. 70 pages PPG106-V7 $13.00. Workbook PPG107-V7 $8.40. Teacher's guide PPG108-V7 $6.70. Contact Social Studies School Service, 800/421-4246.

Street Law (5th Ed. 1994)

The text covers torts, consumer, family, housing, and criminal law as well as individual rights. In addition, each chapter discusses a legal issue as it has arisen in another country. ISBN 0314027130. Hardcover $53.95. Teacher's Manual, Test Bank, Workbook, and video series available. Grades 9–12. Contact West Educational Publishing, School Division, 800/328-2209.

The Streets, the Courts, & the Community

An introduction to law-related education for the at-risk or special-needs student. The 10 easy-reading lessons address civil law, criminal law, the juvenile justice system, and conflict management. 64 pages. Grades 7–12. $18.50 Contact Constitutional Rights Foundation, 800/488-4CRF.

Mock Trials

The ABA distributes three civil mock trials for grades 7–12. The booklets contain information on types of mock trials, tips on preparing and conducting the trial, simplified steps and rules in a trial, and guidelines on mock trial competitions. Contact ABA Publications Dept., 800/285-2221.

Andrews v. Springville School System A lawsuit brought against a local school system by the parents of a high school girl who has been refused a tryout for the boys' soccer team. PC #317-0121 $4.00 individual, $36 (set of 10), $97.50 (class set of 30).

Hudson v. The Washington Post The case of a divorced father who has custody of his and his former wife's son. The mother abducted the child, and her story appeared in *The Washington Post.* The issue is whether the best interests of a child and a father's right to custody outweigh a reporter's and newspaper's right to maintain the confidentiality of their sources. PC #317-0120 (Same prices as above)

Murphy v. National Sheet Metal A civil trial that addresses the question of equal employment opportunity for women and the effect it has had on employers' hiring and promotion practices. PC #317-0119 (Same prices as above)

Simulation

We the Jury

Designed to give students an in-depth view of jury proceedings and demystify the jury-selection process, this simulation allows 25–35 students to take the roles of prospective jurors, judges, attorneys, and court officials while conducting a simulated jury-selection process. Hypothetical scenarios include a civil product liability case and a criminal robbery case. Grades 8–12. $18.95 Contact Constitutional Rights Foundation, 800/488-4CRF.

Software

Docket on Disk: A Digest of Supreme Court Decisions From 1977 Through 1993

Explore easily searchable summaries of nearly 400 important U.S. Supreme Court cases chosen for their significance to 7–12 grade students. Browse through legal topics via search terms such as "libel law," "product liability," "sex discrimination," and "voting rights." Or look up specific cases such as *Hazelwood School District v. Kuhlmeier* and *New Jersey v. T.L.O.* IBM-compatible. PC #497-0080 $35.00. Contact ABA Publications Dept., 800/285-2221.

Videotapes

Civil Law: Understanding Your Rights, Remedies, and Obligations

The three-part program gives students information on signing contracts, securing rights as a renter, and buying such items as houses, cars, and stereos. The program also explores how a civil suit is tried, what makes a contract enforceable, and what occurs when a contract is broken. 45 minutes. (Video from filmstrip) HRM220V-V7 $95.00 Contact Social Studies School Service, 800/421-4246

Understanding the Courts

Get a behind-the-scenes look at the state court system in action with an exciting videotape narrated by news anchor Lester Holt. *The Understanding the Courts* package includes two 20-minute programs, *Anatomy of a Criminal Case* and *Anatomy of a Civil Case*; a viewer's guide, and an instructor's handbook. This fascinating series features interviews with legal professionals and dramatizations of courtroom procedures. The programs highlight how constitutional principles shape our judicial process and address what every informed citizen should know about the courts. PC #468-0037 $25.00. Contact ABA Publications Dept., 800/285-2221.

Contracts, Warranties, and Credit

Addresses contracts and their broad application in our daily lives; definition of a contract, fraud; contract enforcement; warranties; title of ownership; credit cards; and the use of credit. LA10AN2. $69.50 Accompanied by a Teacher's Manual. Contact South-Western, 800/543-7972.

Dealing With Debt: Bankruptcy and Other Options

Temporary unemployment, high credit card debts, and major medical expenses have strained finances for many families. This brand-new 27-minute videotape features three scenarios in which typical families weigh their options in deciding what is best for their particular situation. The package includes the VHS videotape and one copy of a 24-page companion booklet, *Dealing With Debt: Your Guide to Bankruptcy and Other Options*, which also can be purchased separately (PC #468-0053) @ $2.50, with quantity discounts available. PC #468-0052 $49.00. Contact ABA Publications Dept., 800/285-2221.

A Question of Facts

This mock trial presents a videotaped incident (sale of a used car) that sets the stage for students to participate as attorneys, defendant, bailiff, plaintiff, jury, and witnesses. The attorneys in this case never see the videotape of the disputed incident and can only get information about the case by questioning their witnesses, adding reality to the mock trial. A Teacher's Manual provides all the procedural information needed. LA25NN1 $69.50. Contact South-Western, 800/543-7972.

A Journalist's Guide to Civil Procedure

Two high-profile cases are used to illustrate the complexity of civil procedure. The stories behind these landmark cases are told by the lawyers who argued them. The 40-minute videotape is accompanied by a pocket-sized primer on the topic. PC #468-0044 $49.00. Contact ABA Publications Dept., 800/285-2221.

Civil Law Glossary

Source: Excerpted from A Journalist's Guide to Civil Procedure. *Chicago: American Bar Association Commission on Public Understanding, 1993, pp. 21–41.*

Update on Law-Related Education, 21.3, 1997, pp. 60–62. © 1997 American Bar Association.

A

adjudication—Giving or pronouncing a judgment or decree; also the judgment given.

allegation—The assertion, declaration, or statement of a party to an action, made in pleading, setting out what he or she expects to prove.

appeal—A plea to a higher court to alter or overturn a verdict or decision of a lower court because of error or injustice.

appearance—The formal proceeding by which a defendant submits himself or herself to the jurisdiction of the court.

appellate court—A court having jurisdiction of appeal and review; not a "trial court."

B

brief—A written document prepared by an attorney to file in court, usually setting forth both facts and law in support of his or her case.

burden of proof—In the law of evidence, the necessity or duty of affirmatively proving a fact or facts in dispute. This burden may shift from the plaintiff to the defendant during a trial.

C

cause—A lawsuit, litigation or legal action.

circuit courts—In several states, the name given to a tribunal the territorial jurisdiction of which may comprise several counties or districts.

claim—An assertion that the suing party has been injured by the action of another.

class action—A lawsuit filed on behalf of many persons with a common legal interest at stake.

clear and convincing evidence—A level of proof requiring the truth of the facts asserted to be highly probable.

common law—A body of rulings made by judges using, as guidelines, community customs and previous court decisions, or precedents, rather than written laws, or statutes.

compensatory damages—A form of money payment awarded at the end of a case to pay a person for the actual losses he or she has already suffered or will suffer because of wrong done to him or her.

complainant—The individual who initiates a lawsuit; synonymous with plaintiff.

complaint—The first or initiatory pleading on the part of the plaintiff in a civil action.

conclusions of law—The proposed or actual declarations of the legal basis for a court's ruling in a civil case.

court of last resort—A final court that decides a case on appeal; a supreme court.

cross-examination—The questioning of a witness in a trial, or in the taking of a deposition, by the party opposed to the one who produced the witness.

D

damages—Monetary compensation that may be recovered in the courts by any person who has suffered loss, detriment, or injury to his or her person, property, or rights, through the unlawful act or negligence of another.

decree—A decision or order of the court. A final decree is one that finally disposes of the litigation; an interlocutory decree is a provisional or preliminary decree that is not final.

defendant—A person who is sued or accused by another person in a court.

deliberation—The process by which a jury reaches a verdict at the close of a trial.

deposition—The sworn testimony of a witness taken by a report outside of court.

direct examination—The first interrogation of a witness by the party on whose behalf he or she is called.

discovery—The process, before or during a trial, by which one side seeks to determine the evidence in possession of the other side that could affect the outcome of the case.

dissent—A term commonly used to denote the disagreement of one or more judges of a court with the decision of the majority.

docket—The court record in which cases are listed or formally entered.

double jeopardy—The common-law and constitutional prohibition against more than one prosecution for the same crime, transaction or omission.

due process—Law in its regular course of administration through the courts of justice. The guarantee of due process requires that every person have the protection of a fair trial.

E

enjoin—To require a person, by an injunction from a court of equity, to perform, or to abstain or desist from, some act.

exemplary damages—An order to pay money as a form of punishment or deterrence from future error that has caused legal injury.

F

Federal Rules of Civil Procedure—Under the Rules Enabling Act of 1934, Congress granted the Supreme Court comprehensive procedural rule-making power resulting in the Federal Rules of Civil Procedure of 1938. These rules govern all civil actions in the U.S. district courts as well as adversary proceedings in federal bankruptcy courts, and most states have modeled their own procedural rules after them.

finding—A formal conclusion by a judge of a fact or a principle of law.

G

general damages—A form of compensatory damages, ordered paid when the injury done was a natural and necessary consequence of the wrong or error done.

H

hearing—Any form of judicial, quasi-judicial, or legislative proceeding at which issues are heard.

I

injunction—A mandatory or prohibitive order issued by a court.

J

judgment—A formal order of the court.

jurisdiction—The court's authority to hear and/or decide a case.

jury—A certain number of persons, usually selected from lists of registered voters or licensed drivers, sworn to inquire of certain matters of fact and declare the truth upon evidence laid before them during a trial.

L

limitation (statute of)—A certain time allowed by statute in which litigation must be brought.

M

mandate—A judicial command or precept proceeding from a court or judicial officer, directing the proper officer to enforce a judgment, sentence, or decree.

merits—Issues of legal substance at stake in a case, as opposed to procedural considerations.

mistrial—An erroneous or invalid trial; a trial that cannot stand in law because of lack of jurisdiction, incorrect procedure with respect to jury selection, or disregard of some other fundamental requisite; an invalid trial because of the inability of a jury to reach a verdict.

motion to dismiss—A formal request for the court to dismiss a complaint for reasons of insufficiency of evidence.

motion for a new trial—A request that the judge grant a new trial because of a fundamental error.

motion to strike—A request that the judge remove evidence or briefs offered in a case.

municipal courts—In the judicial organization of some states, courts whose territorial authority is confined to a city or community.

N

notice—A formal notification to a party that a lawsuit has been initiated.

notice of appeal—A short formal document indicating that an appeal has been filed from a judgment or verdict.

notice to produce—A written notice requiring the opposite party to yield a certain described paper or document in advance or at the trial.

P

parties—The persons who are actively involved with the prosecution or defense of a legal proceeding.

plaintiff—A person who brings an action; the party who complains or sues in a personal action and is so named on the record.

pleading—The process by which the parties in a suit or action alternately present written statements of their contentions, each responsive to that which precedes, and each serving to narrow the field of controversy.

precedent—An adjudged case or decision of a court considered as furnishing an example or authority for an identical or similar case or a question of law that arises afterwards.

pretrial conference—A meeting in which attorneys for both sides meet the judge in advance of the trial to seek to clarify or narrow the issues.

punitive damages—An order to pay money as a form of punishment or deterrence from future error of the same kind that has caused legal injury or wrong.

R

rebuttal—The introduction of contrary evidence; the showing that statements of witnesses as to what occurred is not true; the stage of a trial at which such evidence may be introduced.

record—All of the documents and evidence plus transcripts of oral proceedings in a case.

remedy—A legal or judicial means by which a right or privilege is enforced or the violation of a right or privilege is prevented, redressed, or compensated.

respondent—The party that has been sued in a civil case.

reverse—The action of a higher court in setting aside or revoking a lower court decision.

Rules Enabling Act of 1934—*See* Federal Rules of Civil Procedure.

S

statute—The written law, such as codes.

summons—A document directing the sheriff or other officer to notify the named person that an action has been commenced against him or her in court and that he or she is required to appear, on the day named, and answer the complaint.

T

testimony—Evidence given by a competent witness, under oath, as distinguished from evidence derived from writings and other sources.

tort—A wrongful act, injury, or damage for which a civil action can be brought.

V

venue—The particular county, city, or geographical area in which a court with jurisdiction may hear and determine a case.

verdict—In practice, the formal and unanimous decision or finding made by a jury, reported to the court, and accepted by it.

W

waive—To abandon or relinquish a right of privilege.

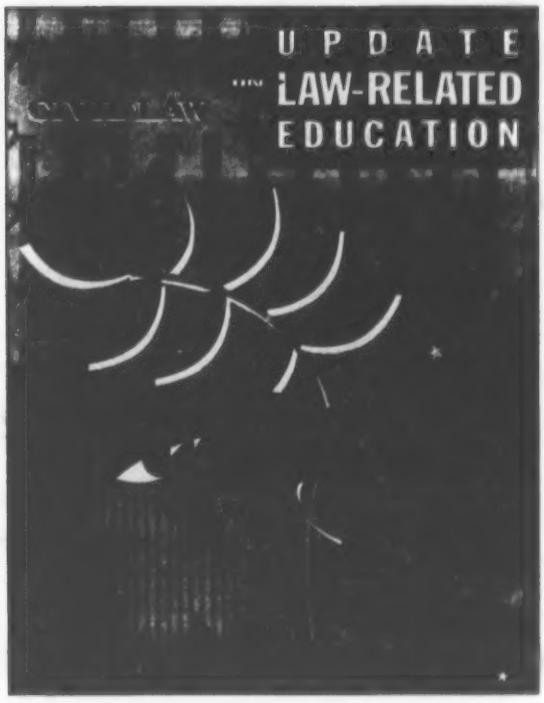
witness—One who testifies to what he or she has seen, heard, or otherwise observed.

writ—An order issued from a court requiring the performance of a specified act, or giving authority and commission to have it done.

Law-Related Education Essentials Matrix

From *Essentials of Law-Related Education.* © 1995 American Bar Association.

	TS p. 36	TS p. 41	TS p. 44	SF p. 47	TS p. 52	TS p. 55
Subject Matter						
Law						
How the role of law is fundamental in democratic and other societies	x		x	x	x	x
How laws are made, enforced, and interpreted	x		x		x	x
What the types of law are, including civil law	x		x	x		
Justice						
Role of courts and other institutions/professionals of the justice system in American government and society	x		x	x		x
Role of adversarial system and other mechanisms for resolving disputes and conflicts in society		x		x		
Definition of certain attributes and values of the U.S. justice system						
. . . distinction between civil and criminal law	x		x	x		
Contexts and Practices of Instruction						
Conditions Necessary for Effective LRE Instruction						
Access to, and use of, community resource leaders	x	x		x		
Access to, and use of, exemplary classroom materials	x	x	x	x	x	x
Problem-oriented approach to instruction	x	x	x			x
Instructional Strategies						
Instruct interactively						
. . . use cooperative learning strategies, simulations, and role plays		x	x	x	x	x
. . . use group work activities, including group research projects	x		x	x		
Develop curriculum						
. . . balanced	x	x	x	x	x	x
. . . relevant	x	x	x	x	x	x
Assessment						
Assesses students' values, interests, experiences, and knowledge prior to, and after, instruction			x	x		
Bases assessment on performance and outcomes	x	x			x	x
Skills						
Research						
Knowing how to acquire information related to the law and legal issues				x	x	x
Conducting personal interviews or engaging in field research about legal issues		x		x		x
Thinking						
Developing capacity for understanding when and how laws apply to specific fact situations	x		x	x		
Summarizing and synthesizing law-related information		x		x	x	x
Developing capacity for understanding and evaluating controversies and conflicts arising from legal issues	x		x	x		x
Communications and Social Participation						
Articulating and expressing ideas, beliefs, and opinions regarding legal issues	x	x	x	x		x
Working cooperatively with others to make decisions and take actions concerning hypothetical or actual legal and law-related social issues	x	x	x			
Attitudes, Beliefs, and Values						
Substantive						
Furthering dedication to the ideal of justice in society	x		x	x		
Appreciating the value of legitimately resolving conflicts and differences in society	x	x	x	x		x
Procedural						
Understanding how attitudes, values, and beliefs essential to LRE are fostered through teaching of fundamental subject matter	x	x	x	x	x	x



COMING THIS WINTER

Bill of Rights
Articles, lessons, and educational resources focusing on timely Bill of Rights issues

- Limits and Responsibilities of Free Expression
- Hate Speech and Hostile Environments
- Internet and Censorship
- The Flag, Free Speech, and Amending the Constitution

DIVISION FOR PUBLIC EDUCATION

AMERICAN BAR ASSOCIATION
PED/15.3
541 North Fairbanks Court
Chicago, IL 60611-3314
http://www.abanet.org/publiced
(312) 988-5735
E-mail: abapubed@abanet.org

ADDRESS CORRECTION REQUESTED

Non-Profit Organization
U.S. Postage
PAID
American Bar Association